Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

———Consolidated With———

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant
Illinois State Board of Elections.

Keenan Printing Company 312-648-0050 365

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On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT

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Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellant, State Board of Elections, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Court of Appeals for the 7th Circuit in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The opinion of the U. S. Court of Appeals for the 7th Circuit was decided December 9, 1977 (App. A, p. 1a).

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division with the Honorable Bernard M. Decker, Judge presiding, were rendered March 14, 1977 (App. B, p. 7a) and April 6, 1977 (App. C, p. 33a).

An agreed order between appellee, Chicago Board of Election Commissioners and appellee, U. S. Labor Party, was signed March 17, 1977 (App. D, p. 39a).

JURISDICTION

This appeal arises from two actions filed by appellees in the United States District Court for the Northern District of Illinois, challenging, among other things, the constitutionality of Illinois law seting forth minimum signature requirements for nominating papers for new political parties and independent candidates.

In both actions, appellees claimed a violation of the First and Fourteenth Amendments of the United States Constitution. Both were actions in equity wherein appellees sought relief under 42 U.S.C. and 28 U.S.C. §§ 2201-2202.

On December 9, 1977, the United States Court of Appeals for the Seventh Circuit affirmed that portion of the District Court's order, which in effect held upon equal protection grounds, that the requirement of 25,000 signatures for state-wide independent and new party candidates must be the maximum number of signatures that can be lawfully required of local independent and new party candidates. Stated otherwise, when the 5% figure as applied to the total vote in the jurisdiction would exceed 25,000, then 25,000 signatures would suffice as the minimum figure for ballot access.

The Court of Appeals, on mootness grounds, declined to rule on the issue raised by appellant as to the authority of a local election administrative agency by agreed order with a local new political party, to lower the minimum signature requirement and to extend the filing deadline contrary to state law and the supervisory authority of appellant.

A timely notice of appeal was filed on January 5, 1978, with the Clerk of the United States Court of Appeals for the Seventh Circuit. Jurisdiction of this appeal is conferred on this Court, pursuant to 28 U.S.C. 1254(2).

In the event that this Court does not consider appeal the proper mode of review, the appellant respectfully requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari, pursuant to 28 U.S.C., § 2103.

STATUTES INVOLVED

"... Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. . . . if such new political party shall be formed for the entire State [the petition] shall be signed by not less than 25,000 qualified voters. . . . If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . ." 46 Ill. Rev. Stats., § 10-2.

"Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; . . . Nominations for independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political

division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . ." 45 Ill. Rev. Stat., § 10-3.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals can negate a state statute recently held constitutional by this Court in *Jackson* v. *Ogilvie*?

(2) Whether a Court of Appeals can ignore the principle of law mandated by this Court in *Moore* v. *Ogilvie*, that the passage of an election does not render moot substantial legal questions still alive for all future elections?

STATEMENT OF THE CASE

Appellees commenced two separate actions in the United States District Court for the Northern District of Illinois to declare as unconstitutional, those provisions of §§ 10-2 and 10-3 of the Illinois Election Code, regarding the nominating petition minimum signature requirement for independent candidates and candidates of new political parties.[1] Jurisdiction was alleged under 28 U.S.C., §§ 1131, 1343, 2201, 2202 and the First and Fourteenth Amendment of the United States Constitution.

Both actions involved a special mayoral election in the City of Chicago scheduled for June 7, 1977.

In *Socialist Workers Party, et al.* v. *Chicago Board of Election Commissioners, et al.*, No. 77 C 255, the Socialist Workers Party and two voters supporting candidates of the Socialist Workers Party sued the Chicago Board of Election Commissioners and its members, the City Clerk of Chicago, and members and employees of the appellant, State Board of Elections.

1. The Appellees also challenged as unconstitutional, the statutory filing deadline for independent candidates and candidates of a new political party. The Trial Court did not rule on this question pending ". . . evidence adduced as to urgency and possible compelling state reason for setting the filing deadline. . . . (App. B, p. 31a). However, since the agreed order between appellees extended the filing period beyond the statutory period, notwithstanding the objections of appellant, this issue was never adjudicated.

In *Gerald Rose, et al.* v. *John Hanly, et al.*, No. 77 C 326, the United States Labor Party, a candidate of the United States Labor Party, and two voters supporting the candidates of the United States Labor Party, sued the Chicago Board of Election Commissioners. At the request of the Chicago Board of Election Commissioners, the appellant, State Board of Elections intervened in this action.

Without an evidentiary hearing, on March 14, 1977, the District Court, in a consolidated opinion, held that a minimum signature requirement in excess of 25,000 signatures ". . . cannot be the least drastic means of accomplishing the state's goals and must be found to unduly impinge the constitutional rights of independents, new political parties and their adherents fn. [16]." (App. B., p. 26a) The Trial Court, in the same opinion, issued a permanent injunction against the defendants.

On March 17, 1977, the District Court signed an agreed order reflecting an agreement between the defendant-appellee, U.S. Labor Party, to reduce the signatures for independent and new political party candidates below the 5% minimum, 39,937 (25,000 by virtue of the district court's March 14th order), to 20,000 signatures, and to extend the filing deadline from sixty-four days before the election (April 14, 1977) to fifty days before the election (April 18, 1977). (App. D, p. 39a) Appellant first learned of the agreed order at this hearing and vigorously objected to its entry.

On March 17, 1977, the appellant moved to vacate the March 14th order of permanent injunction on the grounds that it was issued in violation of Rule 65 of the Federal Rules of Civil Procedure. Appellant further argued that the decision in *Jackson* v. *Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), was binding on the

District Court in that the U. S. Supreme Court specifically upheld the legality of both the .5% minimum signature requirement in Illinois for independent and new political party candidates as well as the petition filing deadline of sixty-four days prior to election day.

On April 4, 1977, the State Board filed an Offer of Proof and another motion to vacate the order of permanent injunction set forth in the March 17th order, maintaining that it was incumbent upon the plaintiffs-appellees to, at the very least, offer evidence that they could neither meet the 35,947 minimum signature requirement nor file their petitions by the statutory deadline. Appellants additionally attacked the legality of the March 17th order, asserting that the Chicago Board lacked authority to agree to an order to lower the minimum signature requirements and/or to extend the filing deadline on behalf of a particular political party contrary to state law.

On April 6, 1977, the District Court denied the motions of the State Board to vacate the orders entered on March 14, 1977 and March 17, 1977. In responding to the law of the case and stare decisis issue, the District Court writes, "The court has great respect for the principle of *stare decisis,* but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised (App. C, p. 36a).

In justification for issuing a permanent injunction without a hearing, the District Court writes, "This contention fails to consider that the only injunctive relief entered in these cases was based upon a question of law, rather than any disputed issue of fact and that both sides had ample opportunity to argue in behalf of their respective positions." (App. C, p. 36a).

On December 9, 1977, the Court of Appeals affirmed the March 14th permanent injunction and adopted the March 14, 1977 memorandum opinion of the District Court. On the question of the issuance of a permanent injunction without an evidentiary hearing in violation of Fed. R. Civ. P. 65, the Court of Appeals dismissed the argument by stating, in part: "No purpose will have been served by holding an evidentiary hearing in this case. There were no actual disputes as to the grounds on which the injunction was ordered." (App. A, p. 4a).

On the question of the authority of a local election agency to reduce the signature requirement below the minimum set by the trial court and extend the filing deadline for one political party (and not for another political party because it did not meet the new standard agreed to between the local agency and the first political party), the Court of Appeals held this to be moot. The Court reasoned, in part, that the order applied only to the special mayoral election, which was over, and the issue, if repeated, could be reviewed at a later time by the Courts. (App. A, p. 6a).

FEDERAL QUESTIONS ARE SUBSTANTIAL

I.

A UNITED STATES COURT OF APPEALS IS BOUND TO FOLLOW THE LAW OF THE UNITED STATES SUPREME COURT.

The ruling of the Court of Appeals directly contradicted the ruling of this Honorable Court in *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S. Ct. 2247 (1971), which summarily affirmed a three-judge district court opinion, 325 F. Supp. 864 (N.D. Ill., 1971).

The *Jackson* opinion specifically upheld the Illinois 5% minimum signature requirement and the sixty day filing deadline for independent candidates seeking the office of Mayor of the City of Chicago. In the three-judge opinion, it states at page 868:

> "Jackson argues that the 5% minimum requirement of § 10-3 of the Illinois Election Code operates to limit his and plaintiffs Wilkinson's and Maclin's first amendment rights. He asserts that before they can act to advance his candidacy they must be joined by a group numbering approximately 58,000 qualified electors of the city. The question more pointedly is, can the state limit the availability of the ballot to only those candidates who evidence the support of 5% of the electorate? We think it can. In *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), the Court noted:
>
> > 'A state clearly has a substantial interest in administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption.'

> "While the 5% requirement is higher than the percentage required in a majority of other states (see, *Williams* v. *Rhodes, supra,* 393 U.S. 33 n. 9, 89 S. Ct. 5) nonetheless, we feel it is a reasonable limitation that serves a compelling interest."

Under the doctrines of *stare decisis* and *law of the case,* the Court of Appeals was bound to follow the dictates of this Honorable Court.

The doctrine of the *law of the case* may be applied not only to cases involving the same parties, but also to contests in which the parties have no legal connection with those in the first case. The doctrine is applicable unless it is proven that the circumstances of the second case are so factually different from those of a previous case that the established rule of law cannot be applied, or that a different rule of law from still another case does, in fact, apply, or that the rule of law in question is itself invalid. See Moore, *Federal Practice,* 1B § 0.401.

The facts of the case at bar are irrelevant for the purpose of the issuance of the permanent injunction since the injunction was issued for all future elections – not just the special mayoral election in Illinois. Most important, the Court of Appeals sanctioned the issuance of the permanent injunction in the absence of any evidentiary hearing, concluding there was no factual dispute as to the grounds on which the injunction was ordered.

Consequently, "When, therefore, a federal court enunciates a rule of law to be applied in the case at bar, it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but as a general proposition, *it establishes the law,* which other courts owing obedience to it *must,* . . . normally apply to the same issues in subsequent proceedings in the case." (Moore, Federal Practice 1B, § 0.404[1]). (Emphasis added).

Therefore, this Court should consider the substantial question of whether a Court of Appeals and District Court can ignore the dictates of a higher court and justify such action by merely stating "The Court has great respect for the principle of *stare decisis*, but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised." (App. C, p. 36a, and thereby ignoring the point that no evidentiary hearing was held to elicit facts and no new relevant law was cited.

II.

SUBSTANTIAL LEGAL ELECTION QUESTIONS CANNOT BE MOOTED BY THE PASSAGE OF THE ELECTION.

This Court should consider the substantial question of whether a Court of Appeals can avoid deciding a crucial issue through the doctrine of mootness in derogation of the general principles promulgated by this Honorable Court.

Appellee, Chicago Board of Election Commissioners, a public agency, violated Illinois election law by substituting an arbitrary standard in lieu of an objective statutory standard for ballot access (20,000 signatures instead of 25,000 signatures as mandated by the District Court). Specifically, this action was undertaken for the benefit of the U. S. Labor Party – a new local political party. Such reduction was effectuated by an agreed order over the objection of appellant that appellee lacked any discretion whatsoever to set a different standard for ballot access.

Indeed, once the Chicago Board exercised discretion, they violated the equal protection rights of other political parties unable to meet either the judicial standard of

25,000 signatures or the U. S. Labor Party standard of 20,000 signatures. Specifically, the Libertarian Party was denied equal protection by the Chicago Board when they requested a further lowering of signature requirements to 18,000 signatures.

In light of this flagrant violation, the Court of Appeals, holding the issue moot since the election had passed, writes in footnote 2: "We in no way suggest that appellants have failed to raise a substantial legal question on the issue. However, in light of our conclusion that it is moot, we will have to postpone consideration of the merits for another day." (App. A, p. 6a).

The law is clear that passage of an election does not render moot an issue still alive for future elections. In *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969), the Illinois Electoral Board (predecessor agency to appellant Illinois State Board of Elections) refused ~~to certify the~~ plaintiffs who were independent candidates for the office of electors of the President and Vice President of the United States in the 1968 election, on the ground that although the plaintiffs' nomination petitions contained 25,000 signatures, as required by an Illinois statute, the petitions did not meet the requirement of the same statute that they include the signatures of 200 qualified voters from each of at least 50 of the 102 counties within the state. Challenging the constitutionality of this statutory provision, the candidates appealed to this Court from an adverse judgment of the three-judge District Court. Refusing to dismiss the appeal as moot because the 1968 election had been already held, this Court pointed out that the questions raised by the state statute would not be answered and would remain and control future elections as long as Illinois maintained her present system as she had

done since 1935. The problem was, therefore, "capable of repetition, yet evading review", and the need for a resolution of the problem reflects a continuing controversy in the federal–state area.

In *Brown* v. *Chote,* 411 U.S. 452, 420, 93 S. Ct. 1732 (1973), this Court held that the conduct of a primary election pending litigation did not render moot the question, raised by persons seeking to become candidates in the election, whether state election code provisions violated the Federal Constitution in requiring primary candidates to pay a filing fee, thereby barring indigents from seeking elective office, and from voting for the candidates of their choice.

In *Storer* v. *Brown,* 415 U.S. 724, 94 S. Ct. 1274 (1974), reh. den. 417 U.S. 926, 94 S. Ct. 2635, the constitutionality of certain California election laws governing access to the ballot were challenged by several independent candidates. The challenge was instituted prior to the 1972 election, but the appeal was not taken until after the election was conducted. Although it was contended that the plaintiffs would now be precluded effective relief, this Court, retaining jurisdiction, rested its decision on the ground that the issues raised would persist if the state statutes were applied in the same manner in future elections. The Court's failure to resolve the controversy on appeal would permit the controversy to be "capable of repetition, yet evading review." Accordingly, this Court reviewed the operation and application of the California statute in order to simplify or preclude future challenges and afford any future plaintiffs the opportunity to file timely cases so that adjudication of similar issues could be had before the election is held.

A state statute involving elections cannot be challenged and then be left unresolved by the court. The likelihood of repetition of the controversy and the public interest in assuring appellate review are the key elements that were settled in *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.,* 219 U.S. 498, 31 S. Ct. 279 (1911). This doctrine applies in cases in which the constitutionality of state election laws are declared moot by the intervening conduct of the election in question. The *Southern Pacific Terminal* doctrine identifies an "exception" to the judicial bar of mootness, at least where the litigation involves actions by or against public officials, and the public interest in assuring enforcement of the legislative will and constitutional mandates.

In the case at bar, an administrative agency arbitrarily, in violation of state law, and the supervisory authority of appellant, used as a standard for access to the ballot, the wishes of one political party. Another political party, the Libertarian Political Party, unable to meet the 20,000 signature standard, was rejected by the Chicago Board in their efforts to lower the signature requirement so that they, too, could obtain access to the ballot.

Such favoritism strikes at the very heart of a democratic system, especially in so crucial an area as elections.

Since such agreed order stands as a precedent for local election authorities to arbitrarily alter Illinois law, this Court should consider the question of whether the resolution of such issue should wait for another day.

CONCLUSION

The decision rendered by the 7th Circuit Court of Appeals has changed the law in election cases by setting new standards for ballot access and for election exceptions to the mootness doctrine, contrary to the rules of law pronounced by this Court, thereby creating conflict in settled law in every circuit in this nation.

For the foregoing reasons, this Court should note probable jurisdiction in this case and give plenary consideration with briefs on the merits and oral arguments for the resolution of these questions, the importance of which can hardly be overestimated.

Respectfully submitted,

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant
Illinois State Board of Elections.

APPENDIX

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APPENDIX A

PER CURIAM OPINION

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
December 9, 1977.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

SOCIALIST WORKERS PARTY, et al., and GERALD ROSE, et al.,
Plaintiffs-Appellees,
No. 77-1475 & 77-1476 vs.
ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
—
Nos. 77-C-255, 77-C-326
—
Honorable Bernard M. Decker
Judge.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the District Court order of March 14, 1977 is hereby AFFIRMED; and, that the appeal from the District Court order of March 17, 1977 is hereby DISMISSED. Costs will be assessed against the appellants. The aforegoing is in accordance with the opinion of this Court filed this date.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH COURT

Nos. 77-1475, 77-1476 (Consolidated)

SOCIALIST WORKERS PARTY, et al.,

Plaintiffs-Appellees,

vs.

ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Defendants-Appellants.

and

GERALD ROSE, et al.,

Plaintiffs-Appellees,

v.

ILLINOIS STATE BOARD OF ELECTIONS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 77-C-255, 77-C-326—Bernard M. Decker, *Judge*.

ARGUED NOVEMBER 21, 1977—

DECIDED DECEMBER 9, 1977

Before CUMMINGS, PELL, and BAUER, *Circuit Judges*.

PER CURIAM. This is an appeal from orders of the district court which: (1) on March 14, 1977, permanently

enjoined the Chicago Board of Election Commissioners from enforcing those portions of Ill. Rev. Stat., Ch. 46 §§ 10-2 and 10-3 which require nominating petitions for new political parties and independent candidates seeking offices serving less than the entire state to contain more than 25,000 signatures; and (2) on March 17, 1977, set the number of petition signatures required of new political parties and independent candidates seeking the office of Mayor of the City of Chicago in the June 7, 1977 Special Mayoral Election at 20,000 signatures and permitted new political party and independent candidate nominating petitions for the June 7 Special Mayoral Election to be filed on or before April 18, 1977.

I. THE MARCH 14, 1977 ORDER

We affirm the permanent injunction issued on March 14, 1977. We are of the opinion that the district court properly enjoined the appellants on the basis of a well-reasoned equal protection analysis. We, therefore, adopt as the opinion of this court the memorandum opinion of the district court published at 433 F. Supp. 11 (N.D. Ill. 1977).

In addition, however, we must consider several issues raised on appeal that were not addressed in the district court's opinion. Appellants argued that the permanent injunction should be reversed because it did not comply with Fed. R. Civ. P. 65. The gist of appellants' argument was that they were denied an opportunity to be heard because the district could did not hold an evidentiary hearing before ordering the permanent injunction.

No purpose would have been served by holding an evidentiary hearing in this case. There was no factual dispute as to the ground on which the injunction was ordered. The district court permitted appellants to file an offer of proof outlining facts they would present if a hearing were

granted. We find nothing in this offer of proof which, if proved, would have altered the result; indeed, it has not been demonstrated that anything that could have arisen in a factual hearing would have altered the result. The absence of such a hearing, therefore, does not constitute a ground for reversal. *See Hagopian* v. *Knowlton,* 470 F. 2d 201, 207 (2d Cir. 1972); *Securities and Exchange Commission* v. *Frank,* 388 F. 2d 486, 490 (2d Cir. 1968).

Appellants also argued that they did not receive sufficient notice that the court would be considering both a preliminary and a permanent injunction. We question the propriety of this argument in light of the fact that the plaintiffs' motion was entitled "Motion for Preliminary and Permanent Injunction." Nevertheless, we note that appellants' claimed surprise at the district court's decision to consider permanent injunctive relief does not, alone, merit reversal. As the Fifth Circuit stated in *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972), "surprise alone is not a sufficient basis for appellate reversal; appellant must also show that the procedures followed resulted in prejudice, . . ." We perceive no such prejudice in this case. The decision to enjoin rested on pure equal protection analysis, and undisputed facts, namely the relevant statutes. A more formal notice would not have provided appellants with a greater opportunity to alter this result. *See Standard Oil Company of Texas* v. *Lopena Gas Company,* 240 F. 2d 504, 509-10 (5th Cir. 1957).

For these reasons, we affirm the order of March 14, 1977.

II. THE MARCH 17, 1977 ORDER

On March 17, 1977, the district court issued an order reflecting an agreement by the Chicago Board and the plaintiffs to lower the five percent statutory signature require-

ment to 20,000 signatures and to extend the filing deadline from April 4 to April 18. Appellant (State Board) requested reversal of this order on the ground that the Chicago Board had no authority to enter such an agreement.[1] We will not address the merits of this argument because we hold that the issue is moot.[2]

The order stated categorically that it applied only to the June 7, 1977 Special Mayoral Election which has long passed. Furthermore, this is not an issue which is "capable of repetition, yet evading review." *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-19 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). We have no reason to believe that a future agreement by an election board to reduce signature requirements and extend filing deadlines in a special election situation, albeit an unlikely occurrence, would evade review. For this reason we dismiss the appeal of the March 17, 1977 order. Costs will be assessed against the appellants.

AFFIRMED IN PART, DISMISSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

1. In the district court, the Chicago Board of Election Commissioners and the State Board of Elections were defendants in the two actions which are consolidated in this appeal. The Chicago Board, however, did not appeal, but filed a responsive brief in opposition to the State Board's contention that the Chicago Board did not have the authority to enter an agreement altering the signature and filing requirements of the statute.

2. We in no way suggest that appellants have failed to raise a substantial legal question on this issue. However, in light of our conclusion that it is moot, we will have to postpone consideration of the merits for another day.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs,
vs.
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants. — NO. 77 C 255

—

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants. — NO. 77 C 326

MEMORANDUM OPINION

Background

A special mayoral election has been scheduled for June 7, 1977, in Chicago to fill the vacancy caused by the death of the late mayor, Richard J. Daley. On January 13, 1977, the defendant in these two cases, the Chicago Board of Election Commissioners,[1] released the election calendar for

1. In No. 77 C 255 the members of the State Board of Elections, and John Marcin, the City Clerk of Chicago, are also named as defendants, as are the two boards in their corporate capacities.

this election. Among its specifics, it set the filing dates and signature requirements for petitions for independent candidates for mayor,[2] and for new political parties,[3] i.e. parties other than the Democratic and Republican parties.

The defendants purported to follow the statutory requirements of the Illinois Election Code, Ill. Rev. Stat. ch. 46. Following Ill. Rev. Stat. ch. 46 § 10-6, they set the filing deadline for new political parties on April 4th, 64 days prior to the election. The filing date for independents was initially set on February 19th, the same day as required for candidates in the major party primaries.[4]

The pertinent language regarding signature requirements in § 10-2, applying to new parties, and § 10-3, applying to independents, is identical:

> "not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve ts respective territorial area."[5]

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2. Independents are defined in Ill. Rev. Stat. ch. 46 § 10-3 as candidates who are "not candidates of any political party."

3. A new political party is any political group which seeks to become an "established political party" but which did not poll more than 5% of the entire vote cast within the political unit at the last election in which that unit voted to elect officers to serve its respective territorial area. A long-standing political party such as the plaintiff Socialist Workers Party may be classified as a "new poitical party" because of lack of electroal success.

4 The primary is scheduled for April 19, 1977.

5. The two sections differ only in that § 10-3 also establishes an 8% signature ceiling for the petitions of independents, and that § 10-2 refers to 5% of the number of "voters" who voted in contrast to § 10-3, which refers to 5% of the number of "persons" who voted.

Nonetheless, the defendants used the voting figures from the April 1, 1975, mayoral election to compute the requirement for independents, and used figures from the November 2, 1976, general election to determine the requirement for new political parties. Thus, the defendants required that the new political parties had to contain 63,373 valid signatures on their petitions, while independents were only required to present petitions with 35,947 signatures.[6]

These two suits were filed by supporters of new political parties and independent candidates seeking access to the ballot to challenge the constitutionality of the Board's determinations.

Case No. 77 C 255 was brought by the Socialist Workers Party and challenges in its first two counts the signature requirements and filing deadlines set for new political partis. Case No. 77 C 326 was brought by the United States Labor Party, and by Gerald Rose, an individual who alleges that he desires to run as an independent in the mayoral election.[7] This case challenges the requirements set out for both new parties and independents. *Rose* v. *Hanly* was brought before this court as related to the earlier filed case. Although the two have not been formally consolidated, they raise essentially overlapping factual and legal issues, and the defendants have filed an identical reply brief in support of both of their motions to dismiss.

In the course of this litigation the defendants have agreed, for the purposes of this special election, to modify

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6. The requirements for candidates in the major party primaries are calculated on a different basis. Democratic candidates need 4,460 signatures and Republic candidates 2,558 signatures.

7. Individuals asserting that they support these parties and candidates are also named as plaintiffs.

these requirements. Independent candidates are now given an extension until April 4th, the deadline set for new parties to file their petitions. And new political parties are only to be required to submit 35,947 valid signatures, the same amount as required of the independents. Thus, the signature requirements and filing deadlines are now identical for independents and new political parties in the forthcoming election.

Both cases seek injunctive and declaratory relief. As noted, there are pending motions to dismiss in both actions, and both sets of plaintiffs have briefed motions for injunctive relief.

II.

Justiciability and the Effect of Recent Supreme Court Cases On Equal Protection

Defendants have not raised any challenge to the justiciability of an election law challenge as a political question. This defense has been clearly rejected by the Supreme Court. *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Wesberry* v. *Sanders*, 376 U.S. 1, 5-7 (1964); *Baker* v. *Carr*, 369 U.S. 186, 208-237 (1962).

They do, however, argue that the plaintiffs cannot challenge their implementation of the state statutes where it cannot be shown that there was any purposeful invidious discrimination. They cite the statement of the Seventh Circuit that

> "To establish a denial of equal protection a candidate for public office must [allege and] prove the existence of an intentional or purposeful discrimination by the election authorities in which one class is favored over another." *Baum* v. *Lunding*, 535 F. 2d 1016, 1018 (7th Cir. 1976).

Baum, however, dealt with a challenge to a regulation which authorized group petitions for candidates seeking to run together as a "slate." However, after consideration of the merits of plaintiff's claim, the Seventh Circuit found that the regulation was not in fact discriminatory against individual candidates, and was based on justifiable policy grounds. It sustained the trial court's conclusion that the complaint was frivolous. Neither *Baum*, nor *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), also cited by the defendants, deals with claims of discriminatory rules regarding ballot access. Such challenges have been repeatedly brought under the equal protection clause, including *Jackson* v. *Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), the case upon which the Board's defense is focused. See also the numerous cases dealing with similar challenges, cited *infra*.

Going beyond these cases, the defendants argue that the recent Supreme Court cases of *Washington* v. *Davis*, 426 U.S. 229 (1976); and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 45 LW 4073 (1/11/77), have established discriminatory intent as an element of all equal protection based claims. *Arlington Heights* states that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 45 LW at 4077.

Both of these cases dealt with situations in which officials effected policies which had a discriminatory impact. The Court felt that this was insufficient to sustain a case for denial of equal protection in the absence of "proof that a discriminatory purpose has been a motivating factor in the decision." 45 LW at 4077.

These cases may be distinguished on several grounds. First, the defendants in *Washington* v. *Davis* and *Arlington Heights* were able to show that they disregarded racial

considerations and considered matters relating solely to job qualifications in hiring and community needs in zoning. However, in the instant case, the challeged policy was the implementation of a law designed to discriminate against frivolous candidacies and parties. The challenged portions of the Election Code are deliberately structured to deny access to the ballot to certain members of the classification in which the plaintiffs are placed by the law. The racial impact in the two Supreme Court cases was found to be incidental;[8] the special burdens placed upon the defendants' classes and challenged in these cases are the central point of the statutory scheme.[9]. .

That these special requirements are more onerous than those placed upon major party candidates or statewide candidates does not *per se* prove a violation of equal protection, but it does put into issue the reasonableness of the classifications and the burdens.

Furthermore, the defendants ignore the fact that the instant cases assert due process claims raising first amendment issues. Defendants are in error when they assert that question of ballot access are cognizable only under the equal protection clause. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the court was faced with a challenge to Ohio's statutory scheme for qualifying third parties on the ballot. The court noted

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8. It is also arguable that these cases are limited to equal protection claims involving alleged racial discrimination.

9. This action must be viewed as an attack on the constitutionality of the applicable portions of the Illinois Election Code. The named defendants are those who have the duty of implementing the challenged statutes. In dealing with the essential legal issues, the absence of animus on the part of the individual defendants is not dispositive of the constitutional questions.

> "the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States." 393 U.S. at 30-31.

Since *Williams* courts have repeatedly considered the First Amendment claims raised by challenges to state ballot laws. *American Party of Texas* v. *White*, 415 U.S. 767 (1974); *Storer* v. *Brown*, 415 U.S. 724 (1974); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Riddell* v. *National Democratic Party*, 508 F. 2d 770 (5th Cir. 1975); *Smith* v. *Cherry*, 489 F. 2d 1098 (7th Cir. 1973); *McCarthy* v. *Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *Bendinger* v. *Ogilvie*, 335 F. Supp. 572 (N.D. Ill. 1971); *Jackson* v. *Ogilvie, supra.*

III.

Ripeness

Noting that the deadlines for filing petitions have not yet passed, the defendants assert that this action is not yet ripe. They contend that there is no real controversy at present, and that plaintiffs are in fact seeking an advisory opinion from the court.

The plaintiffs counter by stressing that they are currently forced to expend their political resources in an effort to satisfy what they feel are unconstitutional requirements. They thus claim to suffer an immediate injury.

The defendants' own brief reveals that the courts have considered this type of situation to raise a controversy ripe for judicial determination. They note that the pertinent filing deadline for the mayoral election in *Jackson* v. *Ogilvie, supra,* was February 1, 1971. The plaintiff filed his case on December 10, 1970, two months before the deadline. The three-judge court considered that case and entered its decision on January 28th, also prior to the filing date. There is no reason why this court should not similarly entertain this case.

IV.

Standard Of Review

The numerous cases that have entailed consideration of state ballot access laws have focused upon the balance of the interests of the plaintiffs in effectively participating in the electoral process, and furthering their desires to express their political beliefs through political associations, against certain state concerns in regulating the electoral process. In *Lubin* v. *Panish,* 415 U.S. 709 (1974), the Court expressed some of these state concerns:

> "That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success." 415 U.S. at 715-16.

In *Bullock* v. *Carter,* 405 U.S. 134, 145 (1972), the Court expressed concern for the state need to "prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." The Court spoke in *Storer* v. *Brown, supra,* of the state interest "in encouraging compromise and political stability." 415 U.S. at 729. The Supreme Court has therefore upheld properly drawn statutes that seek to require "some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Jenness* v. *Fortson, supra,* at 442.

The contrasting concerns of the plaintiffs are well described in the passage from *Williams* v. *Rhodes,* quoted *supra.* The basic political rights of free speech and free association, and free exercise of the franchise need no further amplification. It should not be ignored that third party candidates and programs have had significant impact on our history and political values, even when the electorial campaigns themselves were unsuccessful.[10] Access to the ballot is a threshhold means for general consideration of the ideas espoused by these parties and candidates. Nor can it be ignored that one of our current major parties was itself originally a minor political group. Finally, there has been much concern expressed recently over the substantial portion of the electorate that has failed to exercise its franchise in preceding elections. This absenteeism may itself reflect discouragement with the range of choices on the ballot, or a desire for an effective means of casting a protest vote.

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10. Electorally unsuccessful parties whose platforms have greatly affected American life incude the Free Soil Party, Populist Party, Prohibitionist Party, Socialist Party and several manifestations of the Progressive Party.

Where such important rights are to be balanced against regulations purporting to protect significant state interests, this court has stressed that

> "[b]efore a state can place any restrictions upon the freedom to associate freely and to vote, it must be shown that a compelling state interest justifies such regulation." *Bendinger* v. *Ogilvie, supra,* at 574.

This means that the court is to subject the challenged portions of the Election Code to "strict scrutiny." As was recently said in *McCarthy* v. *Kirkpatrick, supra,* at 373:

> "While the state has a legitimate interest in restricting access to the ballot in order to maintain the integrity of the ballot and preserve an orderly election process, the Supreme Court has required that the means chosen by the state to achieve its goals be carefully scrutinized, for they necessarily place burdens on the right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters to cast their votes effectively."

A review of ballot access cases reveals that the courts have consistently expressed their determination to apply this more rigorous form of constitutional analysis. *American Party of Texas* v. *White,* 415 U.S. 767 (1974); *Bullock* v. *Carter,* 405 U.S. 134 (1972);[11] *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *Riddel* v. *National Democratic Party,* 508 F. 2d 770 (5th Cir. 1975); *Briscoe* v. *Kusper,* 435 F. 2d 1046 (7th Cir. 1970); *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975); *Lawlor* v. *Board of Election Commissioners,* 395 F. Supp. 692 (N.D. Ill. 1975); *Lendall* v. *Bryant,* 387 F. Supp. 397 (E.D. Ark. 1975); *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971).

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11. While there is language in *Bullock* v. *Carter* to the effect that challenges to ballot barriers do not *per se* require strict scrutiny, 405 U.S. at 143, the Court did apply that standard. *See Salera* v. *Tucker,* 399 F. Supp. 1258, 1263, n. 5 (E.D. Pa. 1975).

V.

The 35,947 Signature Requirement

As noted, the defendants have determined that independents and new political parties must obtain 35,947 valid signatures on their petitions in order to qualify for the special mayoral ballot.[12] They assert that this is derived from the statutory requirement of 5% of the voters at the last general election at which Chicago voters voted as a unit for a city office.

The defendants maintain that they are merely complying with the law, and emphasize that a three-judge court sustained the 5% requirement in *Jackson* v. *Ogilvie, supra.*

Jackson was brought by an independent candidate in the 1971 regular mayoral election, and challenged the signature

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12. Since the defendants have agreed not to apply the 63,373 signature requirement, derived from the 1976 election figures, for new parties, and since the court has made its own determination of the validity of the lesser 35,947 requirement, derived from the 1975 mayoral election figures, the issue of the constitutionality of utilizing disparate statistics to satisfy identical statutory requirements is essentially moot. However, it should be noted that *Jackson* v. *Ogilvie, supra,* construed the statute as requiring 5% "of the total number of votes which were cast in *the last preceding election for the office he currently seeks.*" 325 F. Supp. at 866. Furthermore, since Cook County Circuit Judges from Chicago "serve" a judicial district covering all of Cook County, the 1976 elections did not select officeholders serving any district limited to Chicago. There is, therefore, no apparent statutory basis, nor any logical reason to impose a more severe burden on new parties than independents, or to calculate the 5% requirement on the basis of non-municipal election figures.

requirements in Ill. Rev. Stat. ch. 46 § 10-3, as well as the filing deadlines set in §10-4. The majority opinion, supported by Judge Lynch and Judge Perry, held that

> "[w]hile the 5% requirement is higher than the percentage required in a majority of other states (see Williams v. Rhodes *supra*, 393 U.S. 33 n. 9, 89 S. Ct. 5) nonetheless we feel it is a reasonable limitation that serves a compelling state interest." 325 F. Supp. at 868.

A vigorous dissent by Judge Pell noted that no evidentiary hearing had been held to prove the compelling state interest, and concluded, "I am unable to agree nor can I conceive that there is a real possibility of demonstration supporting a compeling state interest in adherence to the 5% restrictive requirement." 325 F. Supp. at 869.

While the defendants argue that the majority opinion is dispositive of these issues, the plaintiffs argue that *Jackson* can be factually distinguished from the instant circumstances.

Essentially this argument is based on the distinction between a regular election and a special election. They note that a candidate or party seeking ballot position in a regular election can begin preparations for signature gathering well in advance of the deadline. The date for the election is known well in advance, and there is no barrier to early circulation of petitions.

By contrast, the need for a special election only materialized on December 20, 1976, when Mayor Daley died. Petitions could not be circulated prior to January 13, the date on which the election was fixed. Thus these plaintiffs have only from January 13 to April 4, 81 days, to obtain the needed signatures.

The unique circumstances created by a special election do, of course, change the context in which the appropriateness of these ballot barriers is to be evaluated. In a case raising slightly different issues, the Illinois Supreme Court has acknowledged that

> "[i]n filling vacancies in office by special primary and election, there must be room for an expansion and contraction of time tables which are observed in the regular election procedure." *People ex rel. Adamowski* v. *Kerner*, 19 Ill. 2d 506, 514 (1960).

More importantly, the United States Supreme Court has repeatedly emphasized that the constitutionality of these types of restrictions must be evaluated upon a situation by situation basis. In *Storer* v. *Brown*, *supra*, it was stated:

> "[T]he rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a 'matter of degree,' *Dunn* v. *Blumstein*, *supra*, at 348, very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' *Williams* v. *Rhodes*, *supra*, at 30; *Dunn* v. *Blumstein*, *supra*, at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance." 415 U.S. at 730.

Simiarly, in *Jenness* v. *Fortson*, *supra*, at 437, the Court emphasized the analysis of *Williams* v. *Rhodes*, *supra*, which demanded a study of "the totality" of the challenged election laws.

The validity of a signature requirement cannot be analyzed, therefore, without consideration of the circumstances

and timeframe within which the petitions may be circulated.[13] In this vein, the court in *Lendall* v. *Bryant, supra,* at 402, noted that "[the signature requirement and the filing deadline] reinforce each other in interdicting independent candidacies . . ."

While the court in *Jackson* v. *Oglivie, supra,* considered the validity of a 5% signature requirement and a filing deadline 64 days prior to the election, it did not do so in the circumstances of a constricted period for circulating petitions. This, in itself, denies *Jackson* any *stare decisis* effect in this action, and leaves the Election Code open to challenge in the context of a special mayoral primary.

Furthermore, since there is no "litmus-paper" test for the validity of ballot-barriers, there is a need for some judicial examination of evidence pertaining to the scope of the burden created by the election laws. In *Storer* v. *Brown, supra,* at 738, the Court stated that "[w]e must, therefore, inquire as to the nature, extent, and likely impact of the California requirements." In the absence of such evidence, the court vacated the judgment and remanded the case to the district court "for further proceedings to determine whether the California election laws place an unconstitutional burden on [plaintiffs'] access to the ballot."

Jackson v. *Ogilvie, supra,* was decided prior to *Storer.* The dissent by Judge Pell noted that "no evidentiary hearing has been held." 325 F. Supp. at 869. The analysis of

13. In *Storer* v. *Brown* the court questioned whether there was any compelling state interest in requiring the collecting of signatures in a limited 24 day period, where the quota was itself substantial. 415 U.S. at 743.

the majority was done *in vacuo,*[14] without any explanation for the finding that "[5%] is a reasonable limitation that serves a compelling state interest."

In *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975), cited by the defendants, the court ruled unconstitutional a portion of the Pennsylvania election code previously sustained by an earlier three-judge court decision. Without challenging the correctness of the prior case, the court nonetheless decided "that the factual situation in our case warrants a different conclusion." 399 F. Supp. at 1268. Similarly, the instant cases, as noted *supra,* present a different factual context than *Jackson.* Since *Jackson* also failed to examine the factual situation to see whether the Illinois statutes created "burdens so severe as to confer an effective political monopoly on the two major parties," *Storer* v. *Brown,* 415 U.S. at 729, there is a definite need to examine the current political realities in Chicago to see whether these cases, too, "[warrant] a different conclusion."

The defendants also argue that requirements as stringent as those posed by the Illinois statutes have been frequently upheld by the courts. However, a review of these cases does not persuade the court that a 5% requirement is constitutional *per se.*

It is true that there is language in *Storer* v. *Brown, supra,* at 740, stating that "[s]tanding alone, gathering 325,000 signatures in 24 days [statewide in California in

14. Indeed the only data cited in [illegible]*n* relating to the necessity for the 5% requirement cuts against the majority's conclusions. The majority noted that this requirement "is higher than the percentage required [illegible] majority of other states"; Judge Pell called this a[illegible]erstatement, noting that 46 states were more lenient th[illegible]llinois.

support of an independent presidential candidacy] would not appear to be an impossible burden." The California statute, like the Illinois regulation at issue before this court, calculated the 5% figure on the basis of the votes cast at the preceding general election rather than the total of registered voters. It may have been harsher than the Illinois statute by excluding those who voted in the primary from signing the petitions.[15]

On the other hand the Court remanded *Storer* for a hearing to clarify the factual context of the statute. It was concerned, among other issues, with ascertaining whether "*in the context of California politics,* could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" 415 U.S. at 742 (Emphasis added). The court mentioned the value of determining whether in the past "candidates have qualified with some regularity."

In *Jenness* v. *Fortson, supra,* the court also upheld a 5% signature requirement. While the 5% figure was based on the larger total of registered voters, rather than votes cast, in the last election, Georgia law permitted voters to sign more than one petition, and to both sign petitions and vote in the primary. Furthermore, candidates had 180 days in which to gather the signatures. The court's conclusion that the Georgia law did "not operate to freeze the political

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15. The defendants note that 35,947 actually represents only 2.1% of the electorate. This discrepancy reflects the low turnout at the last mayoral election. The parties have not clarified to the court their view of the effect signing a petition for a new party or an independent has on the ability of a voter to sign other petitions, or vote in the primary.

status quo," 403 U.S. 438, also relied on a stipulation of facts revealing that the nominating petition route had been employed successfully by recent candidates for governor and President.

Similarly, in *American Party of Texas* v. *White,* 415 U.S. 767 (1974), the court noted that two of the original party plaintiffs had satisfied the challenged petition requirements. Furthermore, the requirements were not as severe as those in issue in the instant cases. Texas required 1% of the vote for governor at the last general election to obtain statewide ballot position for minor parties. A period of 55 days was allowed to circulate the petitions. Independent candidates had to satisfy a signature requirement of 3% to 5%. However, the smaller percentage applied to larger units such as a congressional district, and there was a 500 vote maximum requirement.

The court has before it little information upon which it might hazard a judgment whether the challenged election laws unconstitutionally operate as an exclusionary device structured to "freeze the status quo," particularly in the context of a special Chicago mayoral election. The plaintiff Socialist Workers Party did manage to satisfy the 41,403 signature requirement for the 1975 mayoral election. Still, this was achieved without the more stringent time limitations affecting the current election. There is no evidence that any other independent or third party candidate has ever satisfied the 5% test for a Chicago city-wide election.

The evidence presently before the court makes it impossible to establish the maximum signature requirement within the toleration of the Constitution. Nonetheless, it may be held with certainty that this requirement can in no event exceed 25,000.

Both § 10-2 and § 10-3, which establish the 5% requirement for ballot access for less than statewide elections, also contain provisions that petitions containing 25,000 signatures will be sufficient to obtain ballot placing for statewide races. These signatures may be obtained exclusivly in one country, or even in one city. *Communist Party of Illinois* v. *State Board of Elections,* 518 F. 2d 517 (7th Cir. 1975). The plaintiffs argue that the distinction between the statewide requirements and the 35,947 quote for Chicago mayoral petitions is an irrational denial of equal protection for participants in Chicago municipal elections.

The defendants counter that the contrast with the 25,000 requirement was considered in *Jackson* v. *Ogilvie, supra.* However, it appears that it was only referred to in passing in one sentence of a brief submitted by the defendants in that case. There is no discussion of this issue whatsoever in either the majority opinion or in the dissent. In such a situation there is little reason for this court to hesitate to re-evaluate an important contention. This is particularly true where it is raised in the different factual context of the forthcoming special election. *Salera* v. *Tucker, supra.*

One of the most fundamental principles of constitutional analysis is that

> "even though the governmental purpose be legitimate and substantial, the purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

The need to apply the "least restritcive alternative" has been applied by the Supreme Court to election law challenges:

> "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973).

The Seventh Circuit stressed this requirement in *Briscoe* v. *Kusper,* 435 F. 2d 1046, 1054 (7th Cir. 1970), where it held:

> "This state concern . . . may well call for limitations on access to ballots by those seeking public office. . . . Assuming the constitutional legitimacy of such an objective, due process nevertheless requires that the state accomplish that end narrowly and fairly to avoid obstructing and diluting these fundamental liberties."

In *Lendall* v. *Bryant,* 387 F. Supp. 397, 402 (E.D. Ark. 1975), the court wrote that

> "a State may regulate and to some extent restrict the access of independent candidates to the ballot. . . . However, the measures adopted by the State must not go beyond what the State's compelling interests actually require, and broad and stringent requirements or restrictions with respect to would-be independent candidates cannot stand where more moderate ones would do as well."

This court made the same point in *Bendinger* v. *Oglivie,* 335 F. Supp. 572, 575 (N.D. Ill. 1971), when it pointed out that

> "it must be shown that the state statute in question is not only as fair as possible, but also that it infringes upon the First Amendment rights of those affected as little as practicable under the circumstances.

See also, Dunn v. *Blumstein,* 405 U.S. 330 (1972); *Williams* v. *Rhodes, supra; Riddell* v. *National Democratic Party, supra.*

In drafting the requirement for state-wide races, it must be assumed that the legislature determined the minimum showing of adherents necessary to satisfy the state interest in screening out frivololus candidacies. The legislature found that 25,000 signatures would demonstrate the needed "modicum of support." Presumaby the 5% requirement was drafted out of concern for smaller election districts, where 25,000 voters would be a disproportionate share of the electorate. The size of Chicago and Cook County, however, create the anomaly that 25,000 signatures may fall short of the 5% requirement.

It is not necessary to determine whether this legislative draftmanship reflects carelessness or solicitude for the interests of the major parties in Cook County and Chicago. The court cannot find any rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. *Lendall* v. *Jernigan*, #LR-76-C-309 (E.D. Ark. 1/4/77). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge the constitutional rights of independents, new political parties, and their adherents.[16]

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16. The plaintiffs argue that the proper quota for Chicago should be calculated by applying the Chicago percentage of the statewide vote in 1976 to the 25,000 statewide requirement. This would be 26.18% of 25,000 or 6,545. The court's function in this case is not to rewrite the election code for the legislature, but to determine the outer limits of a constitutionally acceptable ballot access limitation. This cannot be determined without consideration of evidence as to exclusionary effect of any signature requirement under 25,000.

VII.

The April 4 Filing Deadline

As noted, the defendants have agreed to set April 4, 1977, as the filing deadline for petitions for both independents and new political parties.[17] This date is 64 days prior to the special mayoral election, and comes 15 days before the major party primaries.

The plaintiffs' attack on this time frame has two thrusts. First, they argue that the 81 days it allows for circulation of petitions is insufficient. Second, they claim that a pre-primary deadline is too far removed from the election and forces them to attempt to secure signatures in a political vacuum.

Unlike the election codes of other states such as Pennsylvania, Texas and California, the Illinois election laws do not normally confine the circulation of petitions to any restricted period. The circumstance of a finite 81 day-period arises solely because the unexpected need for a special election in effect created an "opening date" for petition gathering. Thus this issue does raise a challenge to the normal functioning of the Illinois statute.

This opinion has already stressed that the constitutionality of a ballot access restriction cannot be properly decided without consideration of the effect of the total regulatory scheme. As a consequence, the appropriateness of an 81-day period is affected by this court's determination that no more than 25,000 signatures need be obtained by plaintiff parties and candidates.

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17. This renders moot the plaintiffs' challenge that the separate statutory filing deadlines for independents and new political parties are arbitrary, irrational and discriminatory.

An 81-day circulation period for the collection of 25,000 or even fewer signatures appears to be within the limits of constitutional tolerance, absent extraordinary circumstances. This opinion has quoted language from *Storer* v. *Brown, supra,* at page 13, finding that a much more severe requirement was likely to be permissible.

Relying on this passage, the court in *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975), held that, in the absence of special needs or other distinguishing circumstances, Pennsylvania could require state-wide candidates to obtain approximately 35,000 signatures within 21 days.

The instant 81-day period gives substantially more time to the plaintiffs in which to obtain a smaller number of signatures, although admittedly from a smaller pool of voters.[18] As a result, absent an evidentiary showing that this time period would significantly impede the access to the ballot of a reasonably diligent party or candidate, the 81-day period could not justify an order extending the filing deadline. The court will not encroach on the legislative prerogative of determining the most appropriate period within constitutional limits.

The question of remoteness from the actual election day does raise a more viable argument. The issues are less likely to be defined, and public interest is likely to be lower when the actual election is far off.[19] Several courts have

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18. The Pennsylvania statute required 2% of the previous voter turnout for ballot access, in contrast with the Illinois 5% requirement.

19. It is true that voter interest in a primary election may be higher in districts where nomination by the majority party is normally "tantamount" to election. Still, that interest may not reach its peak until the vote is imminent.

stressed recently that a remote deadline does indeed unconstitutionally affect the ability of new parties and independents to mount a successful drive. *Salera* v. *Tucker, supra,* at 1266; *Lendall* v. *Bryant, supra,* at 402; *Bradley* v. *Mandel,* #T-76-638 (D. Md. 5/17/76); *McCarthy* v. *Kirkpatrick, supra,* at 374.

The cases cited by the defendants do not dispose of this line of holdings. While the Supreme Court allowed a cutoff 120 days prior to the general election in *American Party of Texas* v. *White, supra,* the Texas statute allowed the circulation of petitions for 55 days *after the primary.* Similarly, the deadline sanctioned in *Storer* v. *Brown, supra,* 60 days prior to the general election, also permitted post-primary gathering of signatures. More importantly, *Salera* v. *Tucker, supra,* was summarily affirmed *sub nom. Tucker* v. *Salera,* __ U.S. __, 44 USLW 3526 (3/22/76), and is a binding statement of the law. *Hicks* v. *Miranda,* 422 U.S. 332 (1975).

It is true that the invalid deadlines overthrown in *Lendall* and the other cases were far more remote than the instant deadline. In *Lendall* petitions had to be submitted two months before the primary and 210 days before the general election. In *McCarthy* the Missouri law required that the petitions be in 97 days before the primary. The Maryland deadline in *Bradley* was 70 days before the primary and 239 days before the general election. *Salera* upset a deadline seven weeks prior to the primary, and as much as 218 days prior to the general election. By contrast, April 4th is only 15 days before the primary, and 64 days before the special election.

On the other hand, the courts in both *Bradley* v. *Mandell* and *McCarthy* v. *Kirkpatrick* accepted an analogy between an independent's petition circulation and a major party primary. While the comparison is not perfect, it is

true that the petition campaign and the primary results both determine the final composition of the election ballot. This is the reason why the courts wil sanction sterner quotas for third parties and independents than for candidates in party primaries; the latter are not guaranteed a place in the general election. As a result, a petition drive for new parties and independents is in fact equivalent to a primary.

It follows that the most fruitful time for gathering signatures is likely to be during the closing days of the primary campaign, when public interest regarding the future composition of the ballot is at a peak. The recent cases, cited *supra*, make it clear that it would be a significant burden on the plaintiffs to foreclose petition collection during the heat of a primary campaign by establishing a pre-primary filing deadline.[20]

This type of burden on the exercise of constitutionally protected rights is subject to strict scrutiny for a truly compelling state justification for the impediment. *Salera* and *Bradley* have rejected the argument that a pre-primary cut-off is necesary to protect the integrity of the ballot from "independent" candidacies launched by individuals defeated in the primary. While the pre-conclusion of spiteful splinter challenges may be essential to the preservation of the party system, there are alternative safeguards which are not so overinclusive. *See also Storer* v. *Brown*, *supra*, at 724. In any event, this is not a real problem as long as the deadline is not set after the primary results are made known.

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20. The three-judge court in *Bradley* permitted the plaintiff to collect signatures until the date of the primary. It added in a footnote that "Bradley may be entitled to more, but that case is not before us and we do not decide it."

It is true that the Supreme Court has acknowledged that the state needs to set up a filing cut-off date to provide time for the verification of signatures, litigation of any challenges, and preparation of the final ballots. *American Party of Texas* v. *White*, *supra*, at 767, no. 18. However, *Salera* and its progeny have held that the state does not have *carte blanche* in fixing the cut-off. The date must be justified by proof of the actual time needed to accomplish the post-filing tasks.

In this regard, it is not irrelevant that the primary is also fixed with regard to the time needed to consider post-primary disputes as to the results and the conduct of the vote.

In sum, the motion to dismiss the claims regarding the filing deadlines must be denied. The appropriateness of injunctive relief on this question will depend on the evident adduced as to urgency and possible compelling state reason for setting the filing deadline prior to the April 19th primary.

VIII.

Summary

The complaints in these two cases state a claim for relief with respect to both the signature requirements and the petition filing deadlines imposed upon new political parties and independent candidates in the forthcoming special mayoral election. Accordingly, the defendants' motions to dismiss are hereby denied.

The court declares that any requirement of more than 25,000 signatures for the mayoral petitions of the plaintiffs is unconstitutional.

Accordingly, it is ordered that the defendants, John Hanly, Marie H. Suthers, and Howard C. Medley, are permanently enjoined[21] from enforcing those portions of Ill. Rev. Stat. ch. 46 § 10-2 and §10-3 requiring that petitions for offices serving less than the entire state contain more than 25,000 signatures. It is further ordered that the defendants, John Hanly, Marie H. Suthers, and Howard C. Medley, are hereby enjoined to accept as valid those nominating petitions for new political parties and independent candidates in the 1977 Special Mayoral Election which contain at least 25,000 signatures if filed within the period as allowed by law.

For the reasons stated herein, the court will stay determination of plaintiffs' motion for an injunction estabishing the signature requirement at less than 25,000, and for an injunction changing the deadline for filing of plaintiffs' petitions to a date less than 64 days removed from the general election, pending presentation of further evidence.

The parties are requested to attend a pretrial conference on Thursday, March 17, 1977, at 9:30 o'clock A.M., to discuss the scheduling of a hearing in these cases, and to possibly reach a stipulated agreement for the regulations pertaining to the instant special mayoral election.

ENTER:

_____

United States District Judge

DATED: March 14, 1977.

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21. Injunctive relief on this point is appropriate at this point. Any requirement over 25,000 is *per se* excessive in light of the requirement for statewide office. There is thus an absolute certainty of success on the merits for the plaintiffs on this claim. Without an injunction the plaintiffs will be injured in the exercise of their constitutional rights. There is no countervailing state or public interest in a denial of immediate injunctive relief.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs,
vs.
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants.
NO. 77 C 255

—

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et a.,
Defendants.
NO. 77 C 326

MEMORANDUM OPINION

The Illinois State Board of Elections, a defendant in Case No. 77 C 255, *Socialist Workers Party* v. *Chicago Board of Election Commissioners,* has moved to vacate the permanent injunction[1] entered in that case and the com-

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1. The injunction required the defendant members of the Chicago Board of Election Commissioners to accept as valid and sufficient petitions containing 25,000 signatures nominating independent candidates and new political parties in the 1977 Special Mayoral Election for the City of Chicago.

panion case of *Rose* v. *Hanly*, No. 77 C 326,[2] on March 14, 1977, as well as the subsequent order entered in these cases on March 17, 1977.[3] In support of its motion it has submitted a legal memorandum containing an offer of proof.

The instant complaints challenged the signature requirements and filing deadlines established for independent candidates and new political parties seeking a place on the ballot in the forthcoming special mayoral election in Chicago. Both sets of plaintiffs and the defendant Chicago Board of Election Commissioners filed voluminous briefs on the legal issues raised by defendants' motion to dismiss. After consideration of these briefs, the court determined as a matter of law that it was unconstitutional to require a greater signature requirement of candidates and parties seeking less than statewide office than the maximum requirement set for statewide offices. Accordingly, the court declared that any requirement of more than 25,000 signatures for Chicago mayoral petitions was unconstitutional, and entered a permanent injunction to that effect.

The defendant State Board raises various issues in its brief, most of which have been discussed at some length in the detailed memorandum opinion entered in these cases on March 14, 1977.

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2. The State Board was not named as a defendant in *Rose* v. *Hanly;* however, it did receive copies of the briefs submitted in that case.

3. The March 17th order reflected the agreement between the plaintiffs in *Rose* v. *Hanly* and the defendant Chicago Board to set petition requirement for the 1977 Special Mayoral Election at 20,000, and to extend the filing deadline to April 18th.

The argument that this case was filed prematurely in that it was brought before the original April 4, 1977, deadline was discussed at pages 7-8 of the memorandum opinion. Defendant's contention that the plaintiffs failed to exhaust their administrative remedies by not contacting the State Board prior to the filing of the lawsuit is of no relevance to a constitutional attack on a state statute. In any even, the State Board itself emphasizes that such recourse would have been futile, since it stresses that it would have upheld the signature requirements challenged by the plaintiffs and found by this court to be unconstitutional.

The State Board also argues that the principle of *stare decisis* required that this court be bound by the decision of the three-judge court in *Jackson* v. *Ogivie,* 325 F. Supp. 864 (N.D. Ill. 1971), which upheld the challenged ballot access requirements. This was, of course, the primary legal argument relied upon by the defendant Chicago Board of Election Commissioners. The court considered this contention in the memorandum opinion at pages 11-20. It noted that in the context of this action, a special mayoral election rather than a regularly scheduled mayoral election, made the ballot access requirement more arduous. This is not denied by the State Board, although it does contend that the requirements are not insuperable even in the circumstances of a special election. The court gave other reasons why the conclusion reached in *Jackson* was not necessarily binding in this action.

Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was

not considered by the *Jackson* court.[4] The court has great respect for the principle of *stare decisis*,[5] but is not bound by previous cases where different facts are alleged and where new and persuasive legal arguments are raised.

The defendant State Board also argues that a permanent injunction could not be entered without a hearing. This contention fails to consider that the only injunctive relief entered in these cases was based upon a question of law, rather than any disputed issue of fact, and that both sides had ample opportunity to argue in behalf of their respective positions.

The only facts related to the injunction were the undisputed points that the defendants had established the signature requirement of 35,947 for the special mayoral election, and that the Illinois election laws require no more than 25,000 signatures for ballot placement in statewide offices. The court ruled that as a matter of law plaintiffs' claims were to be evaluated under the "strict scrutiny" standard of constitutional review, and that the state had to choose the "least restrictive alternative" in setting petition requirements designed to further its legitimate purposes. The court could not find any rational reason why a petition with identical signatures could satisfy these state interests in statewide elections, and yet fail to do the same in a lesser political unit, opinion at page 20. The defendant Chicago Board did not advance any rational

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4. This argument was mentioned in passing in a brief by the defendants but was ignored in both the majority and dissenting opinion in *Jackson*.

5. The four additional cases cited by the defendant State Board as support for the state ballot requirements were all discussed at length in this court's memorandum opinion.

reason for this greater burden on less-than-statewide candidates, nor are any advanced by the defendant State Board.

The injunction and declarative relief entered by the court was limited to this one finding of law based on undisputed facts. The defendant State Board cannot argue that it was entered without an opportunity to be heard. It was aware of the arguments raised in the plaintiffs' complaint and in plaintiffs' briefs, as well as the responses made by the defendant Chicago Board in behalf of their mutual position. It had the chance to file its own briefs on this issue, and chose not to do so. Since there was no factual dispute, a hearing would have been meaningless following the extensive legal argumnts on briefs.

The remaining relief sought by the plaintiffs, a still greater reduction in the signature requirement and an advancement of the filing deadline, were found by the court to reflect a valid cause of action. However, the court found that these claims did raise factual questions, and that injunctive relief could not be granted without further evidence. The argument that a hearing is needed before the determination of these claims is therefore correct, but irrelevant.

In summary, the court did have jurisdiction to consider the instant cases, which presented a ripe controversy between the parties. The decision of *Jackson* v. *Ogilvie, supra*, was not binding upon the court in this action, since the plaintiffs raised new factual and legal issues. The injunction entered on March 14, 1977, was limited to one issue where there was no factual dispute, and upon which both sides had been given ample opportunity to express their views. The subsequent order of March 17th reflected an agreement between the plaintiffs in case No. 77 C 326

and the defendants therein. The 20,000 signature requirement and the April 18th filing deadline agreed to by the parties do not represent any conclusion by the court as to the limits of a constitutionally permissible ballot restriction scheme.[6]

Accordingly, the motion of the defendant Illinois State Board of Election Commisioners to vacate the orders entered in these cases on March 14, 1977, and March 17, 1977, is hereby denied.

ENTER:

/s/ BERNARD M. DECKER
United States District Judge

DATED: April 6, 1977.

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6. The court agrees with the State Board that it is not a judicial function to legislate a ballot access statute. However, it does have the power to find that restrictions on first amendment rights are violative of the equal protection clause. In sum, a court may only set the outer limits of a permissible statutory scheme, leaving the specifics to legislative discretion.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, et al., Plaintiffs,
vs.
JOHN H. HANLY, et al., Defendants.
NO. 77 C 326

ORDER

This matter coming on to be heard by the Court, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 20,000 signatures.

(B) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-3 to qualify for placement on the ballot as an independent candidate in the Special Mayoral Election shall be 20,000 signatures.

(C) That the last date for filing either as a new political party or as an independent candidate in the Special Mayoral Election shall be April 18, 1977.

ENTER:

JUDGE

DATED: March 17, 1977.

APPENDIX E

Chap. 46, Ill. Rev. Stat. (1975), Sec. 10-2

§ 10-2. The term "political party," as hereinafter used in this Article 10, shall mean any "established political party," as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established polical party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at such next ensuing elec-

tion such list of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be, under the name of and as the candidates of such new political party.

If, at such ensuing election, the new political party's candidate for Governor shall receive more than 5% of the entire votes cast for Governor, then such new political party shall become an "established political party" as to the State and as to every district or political subdivision thereof. If, at such ensuing election, the other candidates of the new political party, or any other candidate or candidates of the new political party shall receive more than 5% of all the votes cast for the office or offices for which they were candidates at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast for the office or offices for which they were candidates. It shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

A political party which continues to receive for its candidate for Governor more than 5% of the entire vote cast for Governor, shall remain an "established political party" as to the State and as to every district or political subdivision thereof. But if the political party's candidate for Governor fails to receive more than 5% of the entire vote cast for Governor, or if the political party does not nominate a candidate for Governor, the political party shall remain an "established political party" within the State or within

such district or political subdivision less than the State, as the case may be, only so long as, and only in those districts or political subdivisions in which, the candidates of that political party, or any candidate or candidates of that political party, continue to receive more than 5% of all the votes cast for the office or offices for which they were candidates at succeeding general elections within the State or within any district or political subdivision of the State, as the case may be.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which the new political party has become established and the party committeeman or committeemen so seected shall constitute a provisional party organization for the new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which the new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties. [Amended by Public Act 78-918, effective October 1, 1973.]

APPENDIX F

Chapter 46, Ill. Rev. Stat. (1975), Sec. 10-3

§ 10-3. Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area; Provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified. For the first election following a redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district. For the first election following a redistricting of legislative districts, nomination papers for an independent candidate for State Senator or Representative in the General Assembly shall be signed by at least 3,000 qualified voters of the legislative district. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot shall not be so added by petition for the same office.

In the case of the offices of Governor and Lieutenant Governor a joint petition including one candidate for each of those offices must be filed.

Every petition for nomination of an independent candidate for any office for which candidates of established political parties are nominated by primary shall be filed at the time designated in Section 7-12 of this Act in regard to the nomination by primary of any other candidate for such office. [Amended by PA 79-1100, effective October 1, 1975.]

APPENDIX G

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ILLINOIS STATE BOARD OF ELECTIONS, Intervernor-Defendant Appellant, vs. GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, U.S. LABOR PARTY, JOHN BROWN, and MITCHELL HIRSCH, Plaintiffs-Appellees.	No. 77-1475, 77-1476 (Consolidated) U.S.C.A. - 7th Circuit Received in Clerk's Office Jan. 5 - 1978 Thomas F. Strubbe Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Illinois State Board of Elections, Intervenor-Defendant Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the United States Court of Appeals for the Seventh Circuit entered in this action on December 9, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1254(2).

DATED: January 5, 1978.

/s/ MICHAEL L. LEVINSON
/s/ MICHAEL E. LAVELLE
/s/ FRANKLIN J. LUNDING, JR.

Attorneys For Illinois State Board of Elections

100 N. LaSalle Street
Room 300
Chicago, Illinois 60602
(312) 435-6440

Supreme Court, U. S.
FILED
JUN 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

——Consolidated With——

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT FILED MARCH 9, 1978
PROBABLE JURISDICTION NOTED ON APRIL 24, 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

——Consolidated With——

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

JURISDICTIONAL STATEMENT FILED MARCH 9, 1978
PROBABLE JURISDICTION NOTED ON APRIL 24, 1978

APPENDIX

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

LIST OF DOCUMENTS

Filed or Entered — Item No.
Judge Decker — 77 C 255

DATE	PROCEEDINGS
1-24-77	Filed Complaint and twelve copies 1
1-24-77	Filed Civil Cover Sheet 2
1-24-77	(a) Filed motion for appointment as process server and order and order of appointment by Peter Thierjung ..... 3 (b) Enter order dated January 24, 1977: Pursuant to Rule 16 of the Local General Rules, it is ordered that Peter Thieryung is hereby appointed as special process server in the above captioned cause as provided by F.R.C.P. 4(c)—By the Clerk Notices mailed 1-24-77.
2- 8-77	Filed appearance of Chicago Board of Election Commissioners and that of Ian H. Levin as attorney with Rule 39 Affidavit 4
2- 8-77	Filed defendants' motion to strike and dismiss complaint 5
2-11-77	Filed plaintiff's notice of motion; emergency motion for preliminary and permanent injunction and other relief..... 6
2-11-77	Enter order dated February 11, 1977: Enter order as to number of signatures required to fulfill 5% signature requirement of Ill. Rev. Stat., Ch. 46, Par. 10-2. (DRAFT)—Decker, J. ..... 7 Notices mailed 2-14-77.

DATE	PROCEEDINGS
2-15-77	Filed notice of filing; motion to strike and dismiss plaintiffs' complaint and cause of action against John Marcin, individually and as clerk of the city of Chicago 8
2-25-77	Filed defendants' reply to plaintiffs' memorandum in opposition to defendants' motion to dismiss. ..... 9 (filed by Chgo. Bd. of Elec. Comm. & Illinois State Bd. of Elec.)
3- 4-77	Filed plaintiffs' notice of filing with plaintiffs' response to defendants' reply answering plaintiffs' memorandum in opposition to defendants' motion to dismiss...10
3-14-77	Filed memorandum opinion
3-15-77	Enter order dated 3-14-77; Memorandum opinion filed. Defendants motion to dismiss are denied in accordance with said memorandum opinion. Ordered that defendants, John Hanly, Marie H. Suthers and Howard C. Medley are permanently enjoined from enforcing those portions of Ill. Rev. Stat. ch. 46 Sec. 10-2 and Sec. 10-3 requiring that petitions for offices serving less than the entire state contain more than 25,000 signanatures. Further ordered that the defendants, John Hanly, Marie H. Suthers, and Howard C. Medley, are hereby enjoined to accept as valid those nominating petitions for new political parties and independent candidates in the 1977 Special Mayoral Election which contain at least

DATE	PROCEEDINGS
	25,000 signatures if filed within the period as allowed by law. Parties are requested to attend a pretrial conference on Thursday, March 17, 1977 at 9:30 a.m. to discuss the scheduling of a hearing in these cases, and to possibly reach a stipulated agreement for the regulations pertaining to the instant special mayoral election.—DECKER, J.....11 Mailed notices 3-15-77
3-17-77	Filed defendant Michael L. Levinson motion to vacate order of permanent injunction.....12
3-18-77	Enter order dated 3-17-77, Enter order applying to Special Mayoral Election to be held June 7, 1977, number of signatures requirements. Last date for filing as new political party in Special Mayoral Election shall be April 18, 1977. (DRAFT) Motion of State Ill. to vacate opinion taken under advisement. DECKER, J. 13
3-23-77	Filed plaintiffs offer of proof and request for inj. relief 14
4- 4-77	Filed Defendant State Board of Elections Commissioners offer of proof and request to vacate permanent injunction 15
	* * * * *
4- 7-77	Enter order dated 4-6-77 Memorandum Opinion filed. Motion of defendant Ill. State Board of Commissioners to vacate the orders of Commissioners to vacate the orders entered in these cases on March 14, 1977 and March 17, 1977 is hereby denied. (DRAFT) DECKER, J. 16

DATE	PROCEEDINGS
4-13-77	Filed defendant Illinois State Board of election's notice of appeal and copies 17
4-14-77	Filed defendants motion for stay of order pending appeal, and copies.....18
4-14-77	Filed motion of the Libertarian party of Illinois, et al. to intervene 19
4-15-77	Enter order dated 4-14-77, Motion of Libertarian Party of Ill. for leave to intervene is denied for reasons that a final order of judgment has been rendered by Judge Decker in this cause. CROWLEY, J.....20
4-22-77	Filed Appellant's State Board of Elections Designation of record 21
5- 9-77	Filed Certified Copy from U.S.C.A., 7th Circuit; the record on appeal, including transcript, will be filed with the clerk on or before May 25, 1977. (77-1475) 22
	* * * * *
4- 7-77	Enter order dated 4-5-77; Order entered denying plaintiffs' request for further injunctive relief. (DRAFT)—Decker, J.....23
5-19-77	Clerks file copy of transcript of proceedings had before Judge Decker on February 11, and May 17, 1977 filed by the official court reporter 24

U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

LIST OF DOCUMENTS

Filed or Entered — Item No.
Judge Decker — 77 C 326

DATE	PROCEEDINGS	
1-31-77	Filed Complaint	1
1-31-77	Filed Civil Cover Sheet	2
1-31-77	Filed Appearances of Attorneys with Affidavits re Rule 39 (3)	3
1-31-77	Filed Motion for Appointment as Process Server and Order of Appointment of Barbara Wolinsky	4
2- 8-77	Filed appearance of all defendants with that of Ian H. Levin as attorney; affidavit re rule 39	5
2- 8-77	Filed plaintiffs' motion for preliminary and permanent injunction (filed with Judge Decker)	6
2- 8-77	Filed motion to strike and dismiss the complaint (filed with Judge Decker)	7
2-10-77	Enter order dated 2-8-77; Defendant given leave to file motion to dismiss and memorandum in support. Plaintiff given until Feb. 10, 1977 to file its response. Defendant 5 days for reply. Hearing on motion for preliminary and permanent injunction set for Feb. 11, 1977 at 10 a.m.—Decker, J.	8
2-14-77	Enter order dated 2-11-77; Enter order as to number of signatures required to fulfill 5% signature requirement of Ill. Rev. Stat. Ch. 46, Par. 10-2.—DRAFT—DECKER, J.	9

DATE	PROCEEDINGS	
2-11-77	Filed plaintiffs' motion for leave to file brief in excess of fifteen pages	10
2-11-77	Filed memorandum in opposition to defendants' motion to dismiss and in support of plaintiffs' motion for preliminary and permanent injunction.	
2-14-77	Enter order dated 2-11-77; Plaintiff given leave to file memorandum in support of motion for preliminary injunction and permanent injunction and in opposition to defendants' motion to dismiss in excess of 15 pages. Defendant 14 days to file answering brief and plaintiff 5 days for reply.—DECKER, J.	11
2-22-77	Filed petition for attorneys' fees by plaintiff	12
2-25-77	Filed defendants' reply to plaintiffs' memorandum in opposition to defendants' motion to dismiss	13
3- 4-77	Filed defendants' answer to petition for attorneys fees	14
3- 4-77	Filed objection and memorandum in opposition to petition for attorneys fees	15
3- 4-77	Filed State Board of Elections (comprised of defendants) response to petition for attorneys' fees	16
3-14-77	Filed Memorandum opinion	
3-15-77	Enter order dated 3-14-77; Defendants' motions to dismiss are denied in accordance with said memorandum opinion. ORDERED that defendants, John Hanly, Marie H. Suthers and Howard C. Medley	

DATE PROCEEDINGS

are permanently enjoined from enforcing those portions of Ill. Rev. Stats. ch. 46 Sec. 10-2 and Sec. 10-3 requiring that petitions for offices serving less than the entire state contain more than 25,000 signatures. FURTHER ORDERED that the defendants, John Hanly, Marie H. Suthers and Howard C. Medley, are hereby enjoined to accept as valid those nominating petitions for new political parties and independent candidates in the 1977 Special Mayoral Election which contain at least 25,000 signatures if filed within the period as allowed by law. Parties are requested to attend a pretrial conference on Thursday, March 17, 1977 at 9:30 a.m. to discuss the scheduling of a hearing in these cases, and to possibly reach a stipulated agreement for the regulations pertaining to the instant special mayoral election.
DECKER, J. .....IN CASE 77 C 255 77-1475

3-17-77 Filed Motion to vacate order of permanent injunction 17

3-18-77 Enter order dated 3-17-77; Enter order applying to Special Mayoral Election to be held June 7, 1977, number of signature requirements. Last date for filing either as new political party or independent in special Mayoral Election shall be April 18, 1977. (DRAFT)—Motion of State of Illinois to vacate court's opinion taken under advisement.—DECKER, J. 18

DATE PROCEEDINGS

4- 4-77 Filed defendant's State Board of Elections offer of proof and request to vacate permanent injunction ....in 77 C 255 (77-1475)

4- 7-77 Enter order dated 4-6-77; Memorandum opinion filed (in 77 C 255) Motion of defendant Illinois State Board of Election Commissioners to vacate the orders entered in these cases on March 14, 1977 and March 17, 1977 is hereby denied.—DRAFT—DECKER, J. Mailed notices 4-7-77 19

4-14-77 Filed defendant Illinois State Board of Elections' notice of appeal and copies (not a party to suit) $5.00 20

4-14-77 Filed defendants' motion for stay of order pending appeal, and copies 21

4-14-77 Filed supplemental petition for attorney fees filed by plaintiff with Judge Decker

4-22-77 Filed designation of record, (complete) 22

5-10-77 Filed certified copy of order from U.S.C.A.: The record on appeal, including transcript, will be filed with the Clerk on or before May 25, 1977 23

5-19-77 Clerks file copy of transcript of proceedings had before Judge Decker on February 11 and May 17, 1977 filed by official court reporter .....FILED IN 77 C 255

U.S. COURT OF APPEALS
SEVENTH CIRCUIT — DOCKET

General No. 77-1475
Related Nos.: 77-1476
Pvt. Civil
District: N. Ill., East. Div.
Filed in D. C.: 1-24-77.
Number: 77-C-255.
Notice of Appeal: 4-13-77.
Judge: Bernard M. Decker.

Title: SOCIALIST WORKERS PARTY, et al.,

Plaintiffs-Appellees,

vs.

ILLINOIS STATE BOARD OF ELECTIONS,

Defendant-Appellant.

Appearance	Attorney(s) Appellant(s)	Address
5-12-77	Michael Levinson	100 N. LaSalle St., Rm. 300, Chicago, Ill., 60602
5-12-77	John O'Toole	29 S. LaSalle St., Rm. 830, Chicago, Ill. 60603
5-12-77	Ian Levin	111 W. Wash. St., Rm. 1731, Chicago, Ill. 60602
6-77-77	Lance Haddix	33 N. Dearborn St., Rm. 720, Chicago, Ill., 60602
6-17-77	Ronald Reosti	658 Pallister Ave., Detroit, Mich., 48202

Contents of Record: Filed 5-9-77.
Other: Short Record.
Supplemental Records: Date: 5-23-77.
Contents: 2v pldgs., 1v trans.
Withdrawal of Record:

What Withdrawn	Date	By Whom
2v pldgs., 1v trans.	6- 8-77	J. J. O'Toole
1v pldgs., 1v. trans.	8- 5-77	Jenner & Block
2v pldgs., 1v trans.	8-10-77	Jayne Bernard
2v pldgs., 1v trans., 1 tape	11-29-77	LC
2v pldgs., 1v trans.	3-22-78	LC

Summary Of Events

Docketed: 5-9-77.
Docket Fee Paid: 6-6-77.
Appendix: 7-26-77.
Appellant's Brief: 7-11-77.
Appellant's Brief: 7-26-77.
Appellee's Brief: 9-1-77.
Reply Brief: 9-14-77.
Notice of Oral Arg.: 11-14-77.
Date of Oral Arg.: 11-21-77.
Panel: Cummings, Pell, Bauer.
Opinion Date: 12-9-77 per curiam.
Disposition: AFFIRMED IN PART: DISMISSED PART.

DATE	PROCEEDINGS
5- 9-77	Entered order adopting the following procedural schedule: (1) appeals to be consolidated (2) appellants to pay both docketing fees

DATE	PROCEEDINGS
	(3) appellants' counsel to designate period (4) court reporter to file transcript before May 20, 1977 (5) record to be filed before May 25, 1977 (6) Ill. State Bd. of Elections brief due due June 27, 1977 (7) appellees' briefs due July 27, 1977 (8) Ill. State Bd. of Elections reply brief due August 10, 1977 (9) appeal to be set for oral argument after Sept. 11, 1977.
6-27-77	Filed O&3c appellant's motion to extend time to file brief, svc (+ affd.) (77-1476)
6-29-77	Entered order granting appellant's motion to extend time to file brief, up to July 11, 1977; further ordered that appellees' briefs are due Aug. 11, 1977, and appellant's reply brief is due Aug. 25, 1977; appeal will be set for oral argument after Sept. 11, 1977 (77-1476)
7-11-77	Filed 15c appellant's brief, svc. (77-1476)
7-26-77	Filed 15c Chicago Board of Election Commissioners responsive brief appendix, svc.
8- 4-77	Filed O&3c appellee's motion for extension of time to file brief, (77-1476)
8- 8-77	Entered order extending time for filing appellee's brief (Soc. Work Party) to August 31, 1977; further ordered that appellants' reply brief is due Sept. 14, 1977. (77-1476)
8-11-77	Filed 15c appellees' brief (Gerald Rose and U. S. Labor Party), svc. ((77-1476)

DATE	PROCEEDINGS
8-15-77	Filed O&3c motion of appellees to file proposed order instanter, plus proposed order.
*8-11-77	Filed O&3c appellees' motion to affirm judgment without oral argument, svc. (77-1476)
8-18-77	Entered order granting motion of appellees to file proposed order instanter. (77-1476)
8-26-77	Filed O&2c appellant's objection to deny motion of appellees to affirm judgment without oral argument, svc. (77-1476)
9- 1-77	Filed 15c appellees' brief (Soc. Workers Party), svc. (77-1476)
9-14-77	Filed 15c appellants' reply brief, svc. (77-1476)
11-14-77	Entered order that motion of 8-11-77 filed by appellees to affirm without oral argument, is denied. (77-1476)
11-14-77	Entered order setting appeal for oral argument, 20 min. per side (77-1476)
11-21-77	Heard and taken under advisement. (77- 1476)
12- 9-77	Filed opinion per curiam. (77-1476)
12-12-77	Filed O&1c appellees' bill of costs in the amount of $137.50, svc. (77-1476)
12- 9-77	Entered final judgment order, AFFIRMED; district court order of 3-17-77 is DISMISSED; costs to be assessed against appellants. (77-1476)
12- 9-77	Entered final judgment order: district court order of 3-14-77 is AFFIRMED, and appeal from district court order of 3-17-77 is DISMISSED. (77-1476) (Corrected final judgment)
1- 5-78	Filed O&1c appellant's notice of appeal to Supreme Court. (77-1476)

DATE	PROCEEDINGS
1-10-78	Filed O&3c appellees' motion (Soc. Work. et al) to file bill of costs instanter, svc; tendered O&1c bill of costs. (77-1476)
1-11-78	Entered order that appellees' motion to file bill of costs instanter is denied as untimely. (77-1476)
1-25-78	Entered order that appellees' amended motion to file bill of costs instanter is denied. (77-1476)
3-15-78	Filed notice of filing petition for cert. on on 3-9-78; Supreme Court No. (77-1476)
5- 1-78	Filed notice of letter from Supreme Court noting probable jurisdiction on direct appeal. (77-1476).

U.S. COURT OF APPEALS
SEVENTH CIRCUIT — DOCKET

General No. 77-1476
Related Nos. 77-1475.
Pvt. Civil.
District: N. Ill., East. Div.
Number: 77-C-326.
Judge: Decker.
Filed in D. C.: 1-31-77.
Notice of Appeal: 4-14-77.

Title: GERALD ROSE, et al.,

Plaintiffs-Appellees,

vs.

ILLINOIS STATE BOARD OF ELECTIONS,

Defendant-Appellant.

Appearance	Attorney(s)	Address
5-12-77	Michael Levinson	100 N. LaSalle, Rm. 300, Chicago, Ill., 60602
5-12-77	Kluczynski, Dore & O'Toole	29 S. LaSalle St., Rm. 830, Chicago, Ill. 60603
5-12-77	William R. Quinlan, Corp. Counsel	511 City Hall, Chicago, Ill. 60602
5-12-77	Daniel Pascale	511 City Hall, Chicago, Ill., 60602
5-23-77	Jeffrey D. Coleman	One IBM Plaza, Chicago, Ill., 60611
5-23-77	Jayne W. Barnard	One IBM Plaza, Chicago, Ill., 60611

5-23-77	William H. Luking	One IBM Plaza, Rm. 3100, Chicago, Ill., 60611
6-17-77	Lance Haddix	658 Pallister Ave., Detroit, Mich., 48202
6-17-77	Ronald Reposti	658 Pallister Ave., Detroit, Mich. 48202

Supplemental Records:

5-23-77 (same as 77-1475)

Other: Short Record.

What Withdrawn	Date
Same as 77-1475	6- 8-77
Same as 77-1475	8- 5-77
Same as 77-1475	8-10-77
Same as 77-1475	11 29-77
Same as 77-1475	3-22-78

Docketed: 5-9-77.
Docket Fee Paid: 6-6-77.
Appendix: 7-26-77.
Appellant's Brief: 7-11-77.
Appellant's Brief: 7-26-77.
Appellee's Brief: 9-1-77.
Reply Brief: 9-14-77.
Date of Oral Arg.: 11-21-77.
Panel: Cummings, Pell, Bauer.
Opinion Date: 12-9-77 per curiam.
Disposition: AFFIRMED IN PART; DISMISSED PART.

DATE	PROCEEDINGS
5- 9-77	Entered order adopting the following procedural schedule: (1) appeals to be consolidated (2) appellants to pay both docketing fees

DATE	PROCEEDINGS
	(3) appellants' counsel to designate record (4) court reporter to file transcript before May 20, 1977 (5) record to be filed before May 25, 1977 (6) Ill. State Bd. of Elections brief due June 27, 1977 (7) appellees' briefs due July 27, 1977 (8) Ill. State Bd. of Elections reply brief due August 10, 1977 (9) appeal to be set for oral argument after Sept. 11, 1977. (77-147)
6-27-77	Filed O&3c appellant's motion to extend time to file brief, svc. + affidavit. (77-1475)
6-29-77	Entered order granting appellant's motion for extension of time to file brief, up to July 11, 1977; further ordered that appellees' briefs are due Aug. 11, 1977, and appellant's reply brief is due Aug. 25, 1977; appeal is to be set for oral argument after Sept. 1, 1977. (77-1475)
7-11-77	Filed 15c appellant's brief, svc (77-1475)
7-26-77	Filed 15c of Chicago Board of Election Commissioners responsive br. & appendix, svc
8- 4-77	Filed O&3c appellee's motion for extension of time to file brief, svc (771475)
8- 8-77	Entered order extending time for filing appellee's brief (Soc. Work Party) to August 31, 1977; further ordered that appellants' reply brief is due Sept. 14, 1977. (77-1475)
8-11-77	Filed 15c appellees' brief (Gerald Rose and U. S. Labor Party), svc. (77-1475).
8-15-77	Filed O&3c motion of appellees to file proposed order instanter, plus proposed order.

DATE	PROCEEDINGS
*8-11-77	Filed O&3c appellees' motion to affirm judgment without oral argument, svc. (77-1475)
8-18-77	Entered order granting motion of appellees to file proposed order instanter. (77-1475)
8-26-77	Filed O&2c appellant's objection to deny motion of appellees to affirm judgment without oral argument, svc. (77-1475)
9- 1-77	Filed 15c appellees' brief (Soc. Workers Party), svc. (77-1475)
9-14-77	Filed 15c appellants' reply brief, svc (77-1475)
11-14-77	Entered order that motion of 8-11-77 filed by appellees to affirm without oral arguments, is denied. (77-1475)
11-14-77	Entered order setting appeal for oral argument, 11-21-77 20 min. per side (77-1475)
11-21-77	Heard and taken under advisement. (77-1475)
12- 9-77	Filed per curiam opinion. (77-1475)
12-12-77	Filed O&1c appellees' bill of costs in the amount of $137.50, svc.
*12-9-77	Entered final judgment order, AFFIRMED; district court order of 3-17-77 is DISMISSED; costs to be assessed against appellants. (77-1475)
12- 9-77	Entered corrected final judgment order: district court order of 3-14-77 is AFFIRMED, and appeal from district court order of 3-17-77 is DISMISSED. (77-1475)
1- 5-78	Filed O&1c appellant's notice of appeal to Supreme Court. (77-1475)

DATE	PROCEEDINGS
1-10-78	Filed O&1c appellees' motion (Soc. Work. et al) to file bill of costs instanter, svc; tendered O&1c bill of costs. (77-1475)
1-11-78	Entered order that appellees' motion to file bill of costs instanter is denied as untimely. (77-1475)
1-25-78	Entered order that appellees' amended motion to file bill of costs instanter is denied. (77-1475)
3-15-78	Filed notice of filing petition for cert. on 3-9-78; Supreme Court No. 77-1248. (771475)
5- 1-78	Failed notice of letter from Supreme Court noting probable jurisdiction on direct appeal. (77-1475)

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, MICHAEL TABER, and JOHN DOE,

Plaintiffs,

vs.

CHICAGO BOARD OF ELECTIONS COMMISSIONERS, JOHN H. HANLY, MARIE H. SUTHERS, AND HOWARD C. MEDLEY, SR., INDIVIDUALLY AND AS MEMBERS OF THE CHICAGO BOARD OF ELECTIONS, FRANKLIN J. LUNDING, WILLIAM L. HARRIS, DON W. ADAMS, MICHAEL E. LAVELLE, MICHAEL LEVINSON, DAN HAGEN, DELMAR WARD, INDIVIDUALLY AND AS MEMBERS OF THE STATE BOARD OF ELECTIONS, AND JOHN MARCIN, INDIVIDUALLY AND AS CITY CLERK OF CHICAGO,

Defendants.

H. Stuart Cunningham, Clerk
United States
District Court

—

No. 77C 255

—

Plaintiffs seek the impaneling of a three-judge district court and declaratory and injunctive relief as further delineated herein.

Received
Jan. 24, 1977

COMPLAINT

1. This is an action challenging the constitutionality of § 10-2 of the Illinois Election Code (Chapter 46; Ill. Rev. Stat., 1973) as it applies to the special Mayoral Election of the City of Chicago which unconstitutionally denies the right of recognition of the SOCIALIST WORKERS PARTY (hereinafter SWP) as a new political party and denies its candidate the right to appear on the ballot.

Jurisdiction

2. Jurisdiction is invoked pursuant to the First and Fourteenth Amendments of the Constitution of the U.S. Title 28, U.S.C. § 1331, 1343, 2201, 2202, 2281, and 2284, as well as Title 42, U.S.C. § 1983. The amount in controversy exceeds $10,000.

Plaintiffs

3. Plaintiff SWP, an unincorporated voluntary association having its principal office in Chicago, Illinois, is the Illinois Division of the SOCIALIST WORKERS PARTY, a national political party, and seeks ballot status as a new political party pursuant to §§ 10-2 of the Election Code. It has never run candidates in Illinois who have received more than 5% of the votes cast for the office sought. However, during the campaign for the last mayoral election, the plaintiff secured in excess of 66,000 signatures to qualify for ballot position.

4. Plaintiff, Michael Taber, is a citizen of the United States of America and of the State of Illinois, and a resident of the City of Chicago, Cook County, Illinois, and a duly qualified voter in the State of Illinois, County of Cook and City of Chicago, who seeks to effectively participate in the total election process in the City of Chicago and the

State of Illinois; more particularly, in support of the candidate of the SWP, as a new political party candidate for the Office of Mayor of the City of Chicago in the June 7, 1977 Special Election, and to further associate with persons who would also support the candidacy of the plaintiff, SWP candidate for Mayor of the City of Chicago. Plaintiff, Michael Taber, did not vote in the next preceding primary election to nominate a candidate for the Office of Mayor for the City of Chicago.

5. Plaintiff, John Doe, is a citizen of the United States of America, the State of Illinois, and the County of Cook, residing in the City of Chicago, Illinois, and is a duly qualified voter in the State of Illinois, County of Cook and the City of Chicago. Plaintiff, John Doe did vote in the next preceding primary election for the nomination of a candidate for Mayor of the City of Chicago; but plaintiff John Doe, now seeks to effectively participate in the total election process of the City of Chicago and the State of Illinois, particularly in support of the candidacy of the candidate of the SWP for Mayor of the City of Chicago, and to exercise lawful rights to associate with other persons who seek to support the candidacy of the SWP candidate for Mayor of the City of Chicago, as a new party candidate. This plaintiff, in violation of federal rights under the Fourteenth Amendment to the Constitution of the United States has been unlawfully restricted by the State of Illinois, and by the defendants herein, and the plaintiff has been effectively barred from becoming a signatory on nominating papers, and to otherwise effectively support the SWP candidate, as a new party candidate for Mayor of the City of Chicago.

Defendants

6. The defendants are John Marcin, City Clerk of Chicago, John H. Hanly, Marie H. Suthers, and Howard C. Medley, Sr. They compose the Chicago Board of Elections. The defendants, in their collective official capacity as the Chicago Board of Elections, certify *inter alia*, the names of candidates for office to appear in the upcoming special mayoral primary election and special mayoral election (herein after the special election) pursuant to §§ 7-60 and 7-62 of the Election Code.

7. The State Board of Elections, defendant herein, under the provisions of the Constitution and the statutes of the State of Illinois, has responsibility under article 1A, 10-1 through 10-14 for the faithful execution of the laws of the State of Illinois generally regarding elections, and the provisions of Ill. Rev. Stats. Chapter 46, Sec. 10-1 through Sec. 10-14 in particular. Defendants, State Board of Elections of the State of Illinois as such have the responsibility for the implementation of the election laws and procedures of elections in the State of Illinois, and are sued herein in their official and individual capacities.

Facts

8. Section 10-2 of the Election Code contains the following provisions for designating candidates, in pertinent part:

> Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any

municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

9. In the upcoming June 7, 1977 Special Election, the date for the election, and the election calendar, was set on January 13, 1977 (see attached 1977 Election Calendar). Petitions for a new political party must be filed by April 4, 1977, allowing only 81 days to prepare for and collect the 63,373 signatures required. This compares with 41,403 signatures required in the 1975 Mayoral election, with no time restrictions on the beginning date for petitioning. The plaintiffs claim that the time restrictions for petitioning imposed by the Special Election are burdensome and dis-

criminatory. It would exclude the SWP as a new political party from ballot status in the June 7, 1977 Special Election.

10. These provisions, as construed and applied by the Board of Elections will require it to rule, and it will rule, that the nomination papers to be filed by the plaintiff are invalid because they are not in apparent conformity with the provisions of the clauses and will require it to refuse, and it will refuse, to certify the mayoral candidate of the plaintiffs in the special election.

11. In contrast, for purposes of getting on the ballot and being nominated as a candidate for Mayor of the City of Chicago, defendants and the laws of Illinois as applied to the June 7, 1977 Special Election require the nominees of established political parties to qualify for positions on the ballot for Mayor of the City of Chicago by filing nomination papers containing the signatures of only one-half of one percent of the qualified primary electors of his party in the city.

12. Defendants, and each of them in their official and individual capacities, acting under color of certain statutes of the State of Illinois, have engaged and do now engage in a course of conduct in the implementation of their offices and said statutes of the State of Illinois, as does now deprive and will in the future deprive plaintiffs herein of rights, privileges and immunities secured to them by the Constitution and laws of the United States.

13. The provisions of the Ill. Rev. Stats. Ch. 46, Sec. 10-1 through 10-14, administered by the defendants herein, invidiously discriminate against plaintiff, SWP new party candidate for Mayor of Chicago, in the exercise of this plaintiff's federal rights in the said restrictive election provisions give established political parties and candidates

who are the nominees of said parties, a decided and unconstitutional advantage over new political parties, and over plaintiff, SWP new party candidate for Mayor of the City of Chicago in the 1977 Special Election in his/her efforts to qualify and get on the ballot as a new party candidate for Mayor of the City of Chicago.

14. Although the SWP believes that 10-2, requiring new political parties to collect signatures on nominating petitions at least equal to five (5) percent of the number of votes cast in the preceeding general election, to be in itself burdensome and discriminatory to minority parties, the plaintiffs are only challenging the requirements as they apply to the June 7, 1977 Special Election in the City of Chicago to fill the vacancy of the Hon. Richard J. Daley.

15. Plaintiffs are requesting that because of special circumstances in this special election, most particularly, insufficient notice, and a substantially shorter time period to prepare for and obtain the necessary signatures required to gain ballot status, that a special exception is in order and the plaintiffs should be granted ballot status automatically.

16. The SWP fulfilled petitioning requirements and was certified for the ballot in the April 1, 1975 mayoral election. On January 27, 1975 the SWP filed 66,243 signatures on nominating petitions—(41,463 valid signatures were required).

17. The SWP was the first new political party (or independent candidate) to successfully fulfill these requirements and therefore (1) is knowledgeable concerning the amount of resources, time, preparation, etc., necessary to accomplish this and (2) has shown itself capable of attaining ballot position provided there is sufficient notice and a reasonable time period for fulfilling these requirements. The SWP has also qualified for ballot status in previous state-wide elections.

18. Under usual election procedures, no date is specified for opening of the petitioning period, allowing a new party sufficient time to prepare, plan and collect the necessary number of signatures, as well as to assess the amount of time necessary to accomplish the petitioning. For the April 1, 1975 mayoral election assembling the petitions to put the SWP on the ballot required a period of five (5) months. In the months of September and October, 1974 the following was accomplished: a) selection of the candidate for the office of Mayor of the City of Chicago, b) assembling the necessary staff and volunteers, c) researching and organizing locations for petitioning, d) researching legal requirements for candidates, petitioning, and the correct legal form of the petitions, e) printing of petitions. In the months of November, December of 1974 and January, 1975 the following was accomplished: collection of signatures on nominating petitions and preparation of nominating petitions for submission.

19. The State of Illinois and the defendants herein have no special or valid interest in the premises justifying the imposition upon these plaintiffs, as a new party candidate for the Office of Mayor of the City of Chicago, the unconstitutional burdens and restrictions as are provided for in the statutes and laws of the State of Illinois complained of herein. Rather, plaintiff states that the only purpose for the existence of the aforesaid restrictions and burdens contained in such statutes and laws of the State of Illinois is to provide special advantage and virtual monopoly to established political parties in the State of Illinois, and therefore to inflict unconstitutional deprivations and injury upon the federally protected interests, rights and privileges of this plaintiff to effectively participate in the election processes of the State of Illinois and the City of Chicago.

20. Plaintiffs have moved timely and with dispatch to protect federal rights to effectively participate in the election process of the State of Illinois and the City of Chicago, and to present and qualify as a new party candidate for the Office of Mayor of the City of Chicago.

21. No harm or injury would be caused to the rights of any party or persons should this court remove the unconstitutional burden and restriction imposed upon the plaintiffs by the statutes and laws of the State of Illinois as aforesaid. Further, the name of the SWP candidate for Mayor can properly, lawfull and in timely fashion be placed upon the ballot as a new party candidate for Mayor of the City of Chicago without disrupting the scheduled election for that office, if, and only if, this court acts promptly to protect plaintiffs' federal rights.

WHEREFORE, plaintiffs pray for the entry of an order declaring that the applicable provisions of the election code and enabling ordinances are unconstitutional and void as applied to this Special Election to be held on June 7, 1977; or, in the alternative, declaring those provisions which purport to set forth the requirements for a new party candidate to obtain a position on the ballot for Mayor of the City of Chicago, are unconstitutional as applied to plaintiffs, and inapplicable to the plaintiffs for purposes of qualifying a new party candidate for the Office of Mayor of the City of Chicago, Illinois. Further, that the court grant to these plaintiffs such other and further relief in the premises as to this court seems meet and proper.

COUNT II

Plaintiffs realledge paragraphs 1 through 28 of Count I as their paragraphs 1 through 28 of this Count II.

22. Plaintiff, Michael Taber, is a duly qualified voter in the State of Illinois, County of Cook and City of Chicago, and this plaintiff did not vote in the next preceding primary election to nominate a candidate for the Office of Mayor of the City of Chicago. Therefore, this plaintiff does qualify as a signatory on nominating papers in support of the candidacy of SWP new party candidate for Mayor of Chicago for purposes of the ensuing general election to be held on or about June 7, 1977.

23. This plaintiff is desirous and seeks actively to exercise federal rights secured to him under the provisions of the First Amendment to the Constitution of the United States of America to freely associate with other persons who would or might also support the candidacy of plaintiffs, SWP new party candidate for Mayor of the City of Chicago, Illinois; and in so doing, plaintiff, Michael Taber seeks further to exercise his federal right to meaningfully participate in the total election process in the City of Chicago and State of Illinois, as is a right secured to him by the provisions of the First and Fourteenth Amendments of the Constitution of the United States of America.

24. The unreasonable, unnecessary, onerous and burdensome restrictions imposed by the statutes and laws of the State of Illinois complained of herein, as well as the conduct of the named defendants herein in implementing said laws, combine to invidiously discriminate against this plaintiff in his exercise of his federally protected rights of free association and right to participate meaningfully in the total election process; and the same do deprive this plaintiff of due process and equal protecion of the laws in violation of the First and Fourteenth Amendments to the Constitution of the United States.

WHEREFORE, Michael Taber prays for the entry of a judgment order declaring the provisions of the statutes and laws of the City of Chicago election code applicable to ballot requirements for this upcoming special election for the Office of the Mayor of the City of Chicago unconstitutional and void; and plaintiff Michael Taber prays for the entry of preliminary and permanent injunction against the defendants and each of them restraining and enjoining their further implementation of said laws or otherwise unlawfully restricting this plaintiff in the lawful exercise of his federally protected rights as aforesaid.

COUNT III

Plaintiffs reallege paragraphs 1 through 31 of Count II above, as paragraphs 1 through 31 of this Count III.

25. Plaintiff, John Doe, is a duly qualified voter in the State of Illinois, County of Cook and City of Chicago; this plaintiff did vote in the next preceding primary election for the nomination of a candidate for Mayor of the City of Chicago, and because of the restrictions and prohibitions of the statutes and laws of the State of Illinois and the City of Chicago complained of herein, per forces this plaintiff is restricted and prohibited from being or becoming a qualified signatory on nomination papers in support of the nomination of the SWP's new party candidate for Mayor of the City of Chicago, as the candidate of this plaintiff and SWP's choice to appear on the ballot in the June 7, 1977 special election to be held in the City of Chicago, as a new party candidate for the Office of Mayor of the City of Chicago.

26. Plaintiff, John Doe, despite having already voted in a primary election held to nominate a candidate for the Office of Mayor of the City of Chicago now desires and actively seeks to freely exercise federally protected rights

under the First and Fourteenth Amendment to the Constitution of the United States, to associate with plaintiff, Michael Taber, and other persons who would or might also support the candidacy of plaintiff, SWP's new party candidate for Mayor of the City of Chicago, and in so doing this plaintiff seeks to effectively participate in the total election process in the City of Chicago and State of Illinois, as his right as a qualified voter, under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

27. The unreasonable, unnecessary, onerous and burdensome restrictions imposed by the statutes and laws of the State of Illinois complained of herein, as well as the conduct of the named defendants herein in implementing said laws, combined to invidiously discriminate against this plaintiff in his exercise of federally protected rights of free association and right to participate meaningfully in the total election process; and the same do deprive this plaintiff of due process and equal protection of the laws in violation of 'he First and Fourteenth Amendments to the constitution of the United States.

WHEREFORE, Michael Taber prays for the entry of a judgement order declaring the provisions of the statutes and laws of the State of Illinois and the City of Chicago applicable to the upcoming June 7, 1977 Special Election complained of herein, unconstitutional and void; and plaintiff prays for the entry of a preliminary and permanent injunction the defendants of each of them, restraining and enjoining their further implementation of said laws or otherwise unlawfully restricting this plaintiff in the lawful exercise of federally protected rights as aforesaid.

All plaintiffs here, to wit: The SWP new party candidate for Mayor and Michael Taber further pray that pursuant to

Title 28, U. S. C. 2281 and 2283, a three judge federal district court be immediately convened to hear and determine this proceeding.

Plaintiffs have no adequate remedy at law.

Plaintiffs and each of them further pray that an injunction be issued without bond; and that bond be expressly waived:

A. Restraining the defendants, their agents and attorneys from the enforcement, implementation, operation or execution of any of the foregoing statutes of the State of Illinois complained of herein.

B. Restraining defendants, their agents and attorneys from impeding, restricting, or imposing onerous or unreasonable burdens upon the plaintiffs or any of them, or persons with whom plaintiffs associate or enlist as supporters from exercising the rights, privleges and immunities guaranteed to them by the Constitution and laws of the United States, particularly those rights and privileges secured to plaintiffs under the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

C. Whatever relief the court decides is just and reasonable.

That pending the hearing and determination of the prayers for relief, an interlocutory injunction issue restraining the defedants, their agents, attorneys and all others acting in concert with them from enforcing in any way the provisions of the statutes complained of herein, or from instituting or undertaking any proceeding whatsoever pursuant to said statutes and ordinances against the plaintiffs, their members, friends and supporters herein.

That because of the delicate nature of the federal rights sought to be protected herein, and further because of the unreasonable and burdensome limitations of time imposed by the statutes and laws of the State of Illinois complained of herein, this cause be advanced by this Honorable Court and set for immediate hearing as an emergency matter.

For such other further relief as to the Court would be meet and proper.

/s/ LANCE HADDIX

Attorney for plaintiffs

33 North Dearborn
Suite 815
Chicago, Illinois 60602
(312) 263-7344

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, U. S. LABOR PARTY, JOHN BROWN and MITCHELL HIRSCH,
Plaintiffs,

vs.

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, Sr.,
Defendants.

No. 77 C 326
(Connected case: No. 77 C 255-

Received
Jan. 31, 1977

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, U. S. LABOR PARTY, JOHN BROWN and MITCHELL HIRSCH, plaintiffs, complain against JOHN H. HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR., in their official capacity as members of the Board of Election Commissioners of the City of Chicago, State of Illinois, and state:

This is an action challenging the announced signature requirement and filing deadline for petitions of certain candidates running in the Special Mayoral Election to be held in the City of Chicago on June 7, 1977.

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U. S. C. § 1343(3), in that plaintiffs seek to redress the deprivation, under color of State law, of rights secured to them by the Constitution of the United States; pursuant to 28 U. S. C. § 1343(4) and 42 U. S. C. § 1983, in that plaintiffs allege, as noted above, that defendants' conduct in their official capacity and acting under color of State law has and will deprive plaintiffs of certain rights, privileges, or immunities secured to plaintiffs by the Constitution of the United States; pursuant to 28 U. S. C. § 1651 in that the plaintiffs seek injunctive relief; and pursuant to 28 U. S. C. § 2201 in that plaintiffs seek declaratory relief.

2. Venue is proper in this District pursuant to 28 U. S. C. § 1391(b), in that this action is not founded upon diversity of citizenship, and this District is where all of the defendants reside and in which the claims asserted by plaintiffs herein arose.

Parties

3. Plaintiff Gerald Rose (hereinafter "ROSE") desires to run for election as Mayor of the City of Chicago in the Special Mayoral Election to be held June 7, 1977. He meets the requirements for that office as set forth in Illinois Revised Statutes Ch. 24, § 3-14-1. ROSE desires to run as an independent candidate in the election.

4. Plaintiff Melvin Johnson (hereiafter "JOHNSON") is a duly qualified voter in the City of Chicago and desires to circulate nominating petitions for plaintiff ROSE pursuant to Ill. Rev. Stat. Ch. 46, § 10-4.

5. Plaintiff Richard Leebove (hereinafter "LEEBOVE") is a duly qualified voter in the City of Chicago and desires to vote for plaintiff ROSE.

6. Plaintiff U. S. LABOR PARTY is an unincorporated voluntary association and a "group of persons desiring to form a new political party" for purposes of the Special Mayoral Election to be held June 7, 1977 as provided in Ill. Rev. Stat. Ch. 46 § 10-2.

7. Plaintiff John Brown (hereinafter "BROWN") is a duly qualified voter in the City of Chicago and desires to circulate petitions for plaintiff U. S. LABOR PARTY as a new political party pursuant to Ill. Rev. Stat. Ch. 46 § 10-2.

8. Plaintiff Mitchell Hirsch (hereinafter "HIRSCH") is a duly qualified voter in the City of Chicago and desires to vote for the mayoral candidate of the U. S. LABOR PARTY.

9. Defendants, Hanly, Suthers and Medley are members of the Board of Election Commissioners of the City of Chicago, and as such are responsible pursuant to Ill. Rev. Stat. Ch. 46, § 10-6 for accepting nominating petitions for candidates seeking election in and preparing ballots for the Special Mayoral Election.

Preliminary Statement

10. On December 20, 1976 the office of Mayor of the City of Chicago became vacant. On January 13, 1977, as prescribed by Ill. Rev. Stat. Ch. 24 § 3-2-7 and § 3-4-6, the City Council fixed June 7, 1977 as the date of the Special Mayoral Election (hereinafter "general election") to fill the vacancy.

11. On or about January 18, 1977, defendants Hanly, Suthers and Medley published a "1977 Election Calendar for Chicago" (hereinafter "the Calendar"), attached hereto as Exhibit A to this Complaint.

12. The Calendar provides in accordance with Ill. Rev. Stat. Ch. 46 § 7-5 that the Special Mayoral Primary Election (hereinafter "primary") is to be held April 19, 1977.

COUNT I

Filing Deadline for Independent Candidates

13. The Calendar states that the last day for candidates of established political parties to file nominating petitions for the April 9 primary is February 19, 1977. The last day for independent candidates to file nominating petitions for the June 7 general election is also February 19, 1977. The authority for this simultaneous filing date for independent candidates running in the general election and for candidates of established political parties running in the primary is apparently that portion of Ill. Rev. Stat. Ch. 46 § 10-3 which states:

> "Every petition for nomination of an independent candidate for any office for which candidates of established political parties are nominated by primary shall be filed at the time designated in Sections 7-12 of this Act in regard to the nomination by primary of any other candidate for such office."

14. The Calendar provides in accordance with Ill. Rev. Stat. Ch. 46 § 10-6 that the last day for "new political parties" to file nominating petitions for the June 7 general election is not until April 4, 1977.

15. The early filing deadline for independent candidates imposed by Ill. Rev. Stat. Ch. 46 § 10-3 as applied in his case violates the rights of plaintiffs ROSE, JOHNSON and LEEBOVE under the First and Fourteenth Amendments to the Constitution of the United States because, by requiring independent candidates to circulate and submit nominating petitions within 32 days of the first announcement of the filing period, it places an unreasonably and unnecessarily heavy burden on plaintiff ROSE, thereby restricting his right to associate for the advancement of his political beliefs, and the rights of plaintiffs JOHNSON and

LEEBOVE to associate freely for the purposes of expressing their political beliefs and exercising effectively their right to vote.

16. The unreasonably early nomination deadline for independent candidates invidiously discriminates between independent candidates and candidates of established and new political parties, without any necessary and compelling state justification, thereby denying plaintiffs equal protection under the laws as guaranteed by the Fourteenth Amendment.

17. WHEREFORE, plaintiffs ROSE, JOHNSON and LEEBOVE respectfully request that this Honorable Court:

A. Declare those portions of Ill. Rev. Stat. Ch. 46 § 10-3 which require plaintiff ROSE to file nominating petitions as an independent candidate by February 19, 1977 to be unconstitutional as applied by the defendants in this case.

B. Mandatorily enjoin defendants Hanly, Suthers and Medley to accept the nominating petitions of plaintiff ROSE as an independent candidate for election in the Special Mayoral Election to be held June 7, 1977 if filed on or before May 7, 1977.

C. Grant such other and further relief as the Court deems necessary to protect plaintiffs' rights and the public interest and to prevent violation of the public trust.

D. Award plaintiffs attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U. S. C. § 1988.

COUNT II

Signature Requirement for Independent Candidates

18. The Calendar states that the signature requirement for the nominating petitions for candidates of established political parties in the primary is:

Party	Minimum
Democratic	4,460
Republican	2,558

The authority for this requirement is Ill. Rev. Stat. Ch. 46 § 7-10 which requires the signatures of at least one-half of one percent of the number of voters who voted for the leading vote-getter of that party in the last general election.

19. The Calendar states that the signature requirement for the nominating petitions for independent candidates in the general election is:

Minimum:	35,947
Maximum:	57,514

The authority for this requirement is Ill. Rev. Stat. Ch. 46 § 10-3 which requires the signatures of not less than 5%, nor more than 8% of the total number of voters in the last Mayoral election.

20. Ill. Rev. Stat. Ch. 46 § 10-3 also provides that an independent candidate for statewide office may secure a position on the ballot by filing nomination papers signed by "not less than 25,000 qualified voters of the state".

21. In order to secure a place on the June 7 ballot as an independent candidate, plaintiff ROSE is required to secure 35,947 signatures before February 19, 1977. Thus, particularly in view of the early filing deadline adverted to in Count I, the signature requirement imposed by Ill. Rev. Stat. Ch. 46 § 10-3 for independent candidates is onerous and invidiously discriminates against plaintiff ROSE, who desires to seek election as Mayor as an independent candidate, and his supporters. No necessary and compelling justification exists for this discrimination and the signature requirement for independent candidates as applicable in

this case therefore is violative of the Equat Protection Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution.

22. To require plaintiff ROSE to secure 35,947 signatures in a 31-day period to run as an independent candidate for the office of Mayor of the City of Chicago, when an independent candidate for Governor of the State of Illinois, Secretary of State or any other statewide office would be required under the very same statute to file no more than 25,000 signatures is also an unjustifiable denial of equal protection.

23. WHEREFORE, plaintiffs ROSE, JOHNSON and LEEBOVE respectfully request that this Honorable Court:

A. Declare those portions of Ill. Rev. Stat. Ch. 46 § 10-3 which require an independent candidate to file a petition with at least 35,947 signatures to be unconstitutional as applied by the defendants in this case.

B. Mandatorily enjoin defendants Hanly, Suthers and Medley to accept the nominating petitions of plaintiff ROSE as an independent candidate in the general election if filed with a minimum of 7,189 signatures, or one percent of the voters in the last Mayoral election.

C. Grant such other and further relief as the Court deems necessary to protect plaintiffs' rights and the public interest and to prevent violation of the public trust.

D. Award plaintiffs attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U. S. C. § 1988.

COUNT III

Filing Deadline for New Parties

24. The Calendar states in accordance with Ill. Rev. Stat. Ch. 46 § 10-6 that the last day for a "group of persons

desiring to form a new political party" to file petitions to become a "new political party" for the June 7 general election is April 4, 1977.

25. The filing deadline for new political parties imposed by Ill. Rev. Stat. Ch. 46 § 10-6 violates the rights of plaintiffs, U. S. LABOR PARTY, HIRSCH and BROWN under the First and Fourteenth Amendments to the Constitution of the United States because, by requiring new political parties to circulate and submit nominating petitions in advance of the date of the primary, the statute forces the U. S. LABOR PARTY to operate in a political vacuum and places an unreasonably and unnecessarily heavy burden on its supporters, thereby restricting their fundamental rights to associate for the advancement of their political beliefs, and their fundamental rights to associate freely for the purpose of expressing their political beliefs and to exercise effectively their right to vote.

26. WHEREFORE, plaintiffs U. S. LABOR PARTY, HIRSCH and BROWN respectfully request that this Honorable Court:

A. Declare that portion of Ill. Rev. Stat. Ch. 46 § 10-6 which requires plaintiff U. S. LABOR PARTY to file a petition to become a new political party by April 4, 1977 to be unconstitutional as applied by defendants in this case.

B. Mandatorily enjoin defendants Hanly, Suthers and Medley to accept the nominating petitions of plaintiff U. S. LABOR PARTY for election in the Special Mayoral Election to be held June 7, 1977 if filed on or before May 7, 1977.

C. Grant such other and further relief as the Court deems necessary to protect plaintiffs' rights and the public interest and to prevent violation of the public trust.

D. Award plaintiffs attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988.

COUNT IV

Signature Requirement for New Political Parties

27. Ill. Rev. Stat. Ch. 46 § 10-2 provides that new political parties shall circulate petitions with the name[s] of their candidate[s], and in pertinent part states as follows:

> If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number *not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.* (Emphasis added.)

28. Ill. Rev. Stat. Ch. 46 § 10-3 provides with respect to the filing of nominating petitions for independent candidates:

> Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political subdivision, equaling *not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.* (Emphasis added.)

29. As has been heretofore averred in paragraph 19 of this Complaint, the Calendar prepared by defendants Hanly, Suthers and Medley states that the minimum signature requirement for an independent candidate in the June 7 general election is 35,947 signatures. However, the calendar states that the minimum signature requirement to establish a new political party for the June 7 general election is 63,373 signatures.

30. Defendants have used figures from the April 1, 1975 Mayoral Election to compute the signature requirement for independent candidates, but have used figures from the November 2, 1976 general election, at which county, state and national candidates were elected, to compute the signature requirement for a new political party.

32. The statutes require defendants to compute the minimum number of petition signatures required for both independent candidates and new political parties using the total vote at the April 1, 1975 Mayoral Election because it was "the next preceding general election in such district or political subdivision in which such disrict or political subdivision voted as a unit for the election of officers to serve its respective territorial area". Using April 1, 1975 voting statistics, a minimum of 35,937 signatures should be required for both new political parties and independent candidates.

33. There is no necessary and compelling state justification for the defendants' construction of Ill. Rev. Stat. Ch. 46 § 10-2.

34. The defendants' interpretation of Ill. Rev. Stat. Ch. 46 § 10-2, impermissibly discriminates against plaintiff U. S. LABOR PARTY and its supporters in violation of the Equal Protection Clause of the Fourteenth Amendment.

35. WHEREFORE, notwithstanding any other relief requested herein, plaintiff U. S. LABOR PARTY respectfully requests that this Honorable Court:

A. Declare the construction of Ill. Rev. Stat. Ch. 46 § 10-2 which requires plaintiff U. S. LABOR PARTY to file a petition with at least 63,373 signatures to be unconstitutional as applied by defendants in this case.

B. Mandatorily enjoin defendants Hanly, Suthers, and Medley to accept the petition of plaintiff U. S. LABOR PARTY to become a new political party if filed with a minimum of 35,947 signatures.

C. Grant such other and further relief as the Court deems necessary to protect plaintiffs' rights and the public interest and to prevent violation of the public trust.

D. Award plaintiff attorney's fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U. S. C. § 1988.

COUNT V

36. The Calendar states in accordance with Ill. Rev. Stat. Ch. 46 § 7-10 that the signature requirement for nominating petitions for candidates of established political parties in the primary is:

Party	Minimum
Democratic	4,460
Republican	2,558

37. The Calendar states in accordance with Ill. Rev. Stat. Ch. 46 § 10-3 that the signature requirement for nominating petitions for independent candidates in the general election is:

Minimum:	35,947
Maximum:	57,514

38. The Calendar states that the signature requirement for the nominating petitions for new political parties in the general election is:

Minimum:	63,373

39. Ill. Rev. Stat. Ch. 46 § 10-6 provides that a new political party desiring to run candidates for statewide office

may secure a position on the ballot by filing a petition for the formation of a new party signed by "not less than 25,000 qualified voters".

40. The signature requirement imposed by Ill. Rev. Stat. Ch. 46 § 10-2 for new political parties invidiously discriminates against plaintiff U. S. LABOR PARTY, "a group of individuals desiring to form a new political party", and plaintiffs HIRSCH and BROWN. There is no necessary and compelling state justification for the signature requirement for new political parties and the requirement therefore is violative of the Equal Protection Clause of the Fourteenth Amendment and the First Amendment to the United States Constitution.

41. To require plaintiff U. S. LABOR PARTY to secure 63,373 signatures to run as a candidate for the office of Mayor of the City of Chicago, when a new political party running candidates statewide would be required under the very same statute to file no more than 25,000 signatures is also an unjustifiable denial of equal protection.

42. WHEREFORE, plaintiffs U. S. LABOR PARTY, HIRSCH and BROWN respectfully request that this Honorable Court:

A. Declare that portion of Ill. Stat. Ch. 46, § 10-2 which requires a "group of persons desiring to form a new political party" to file petition with at least 63,373 signatures to be unconstitutional as applied by the defendants in this case.

B. Mandatorily enjoin defendants Hanly, Suthers and Medley to accept the petitions of plaintiff U. S. LABOR PARTY to become a new political party if filed with a minimum of 7,189 signatures, or one percent of the voters in the last mayoral election.

C. Grant such other and further relief as the Court deems necessary to protect plaintiffs' rights and the public interest and to prevent violation of the public trust.

D. Award plaintiffs attorneys' fees pursuant to the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U. S. C. § 1988.

/s/ _____
JAYNE W. BARNARD
One of the attorneys for plaintiffs

WILLIAM H. LUKING
One IBM Plaza
Suite 3100
Chicago, Illinois 60611
(312) 467-9300
JEFFREY D. COLMAN
JAYNE W. BARNARD
One IBM Plaza
Suite 4300
Chicago, Illinois 60611
(312) 222-9350

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, MELVIN JOHNSON, RICHARD LEE-BOVE, U. S. LABOR PARTY, JOHN BROWN and MITCHELL HIRSCH, *Plaintiffs,* vs. JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR., *Defendants.*	No. 77 C 326

MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a), plaintiffs respectfully move this Court for a Preliminary and Permanent Injunction, in the form attached hereto, restraining defendants Hanly, Suthers and Medley, their agents, successors, attorneys, representatives and those acting in concert with them, from enforcing those portions of Ili. Rev. Stat. Ch. 46, §§ 10-2, 10-3 and 10-6 relating to the signature requirements and filing deadlines for nominating petitions for independent candidates and new political parties as defendants have announced those provisions are to be applied to the Special Mayoral Election scheduled for June 7, 1977.

In support of this motion, plaintiffs state as follows:

1. Plaintiff GERALD ROSE desires to run as an independent candidate for Mayor of the City of Chicago. Plaintiffs MELVIN JOHNSON and RICHARD LEE-BOVE desire to circulate petitions on his behalf and support him as a candidate. Plaintiff U. S. LABOR PARTY desires to be a new political party for purposes of the Special Mayoral Election. Plaintiffs JOHN BROWN and MITCHELL HIRSCH desire to circulate petitions for the party and support its candidate in that election.

2. The 1977 Election Calendar for Chicago, prepared and issued or on about January 18, 1977 by defendants pursuant to Ill. Rev. Stat. Ch. 46, §§ 10-2, 10-3 and 10-6, requires individuals desiring to run as independent candidates for Mayor to secure and file petitions with the 35,947 signatures by February 19, 1977, and individuals desiring to form a new political party for the Mayoral Election to secure and file petitions with 63,373 signatures by April 4, 1977.

3. Without any compelling, necessary or even rational governmental interest therefor, defendants have construed identical language in Ill. Rev. Stat. Ch. 46, §§ 10-2 and 10-3 and yet have come up with two different signature requirements for independent candidates and new political parties, to the substantial detriment of persons desiring to form new political parties. This construction denies plaintiff U. S. LABOR PARTY and its supporters equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

4. Without any compelling, necessary or even rational governmental interest therefor, defendants have required that both independent candidates and new political parties file more signatures to qualify for ballot position in the

Chicago Mayoral Election than would be required for ballot position in an Illinois statewide election. This requirement abridges the rights of plaintiffs under the First and Fourteenth Amendments to the United States Constitution.

5. Without any compelling, necessary or even rational governmental interest therefor, defendants have required that both independent candidates and new political parties file their petitions well in advance of the date of party primaries in which they may not even participate and far in advance of the general election in which they hope to participate—independs on February 19 and new parties on April 4, 1977. This requirement abridges the rights of plaintiffs under the First and Fourteenth Amendments to the United States Constitution.

6. In view of the extremely short notice which plaintiffs received of this Special Mayoral Election and the weather conditions under which plaintiffs have been operating, the effect of both these signature requirements and the time period in which these requirements must be met will be to prevent these plaintiffs from effectively organizing to seek ballot position and further express their political ideas in this campaign. In view of all the circumstances, the requirements for ballot position formulated by the defendants place an unnecessary and unconstitutional burden on plaintiffs' ability to engage in the electoral process. Such requirements deny plaintiffs their rights under the First Amendment and deny plaintiffs equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution.

7. Under Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3, both independent candidates and new political parties running in statewide elections may secure ballot position by filing nominating petitions containing as few as 25,000 signatures.

During the last statewide election in November, 1976, Chicago voters cast 1,266,866 out of 4,838,182 or 26.18% of the total ballots cast in the state. A resonable signature requirement for independent candidates and new political parties in this election therefore would be no more than 6,545 signatures (26.18% of 25,000).

8. The special circumstances of this election justify the extension of the filing deadline for petitions for independent candidates and new political parties until May 1, 1977, which is five weeks before the June 7 general election. This extended deadline would afford defendants ample time to print and distribute absentee and regular ballots and would also afford the plaintiffs a reasonable opportunity to exercise their First Amendment rights.

9. Unless a preliminary injunction is entered which reduces the signature requirements for independent candidates and new political parties and extends the time period in which signatures can be gathered, plaintiffs will be deprived of their constitutional rights to meaningfully participate in this Election and thereby will suffer irreparable harm.

10. Well-established principles of equal protection law and several recent federal District Court decisions regarding the right of independent and new party candidates to gain ballot position make it evident that these plaintiffs have a subsantial likelihood of prevailing on the merits of this suit. These cases will be set forth in plaintiffs' memorandum in support of this motion.

11. No significant harm will be caused to defendants by requiring them to accept as valid those nominating petitions for independent candidates and new political parties containing a lesser number of signatures than currently required in the 1977 Election Calendar, and no significant harm will be caused by requiring them to extend the filing deadline past the date of the partisan primaries.

12. The public interest would be served by the entry of the preliminary injunction requested.

WHEREFORE, plaintiffs respectfully request this Court to enter an order mandatorily enjoining the defendants to accept as valid petitions for independent candidates and new political parties in the June 7, 1977 Special Mayoral Election those petitions containing 6,545 signatures and filed on or before May 1, 1977.

Respectfully submitted,

/s/ _____
JEFFREY D. COLMAN
One of the attorneys
for the Plaintiffs

WILLIAM H. LUKING
One IBM Plaza—Suite 3100
Chicago, Illinois 60611
(312) 467-9300
JEFFREY D. COLMAN
JAYNE W. BARNARD
JENNER & BLOCK
One IBM Plaza—Suite 4300
Chicago, Illinois 60611
(312) 222-9350

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALISTS WORKERS PARTY, MICHAEL TABER, AND JOHN DOE,

Plaintiffs,

vs.

CHICAGO BOARD OF ELECTION COMMISSIONERS, JOHN H. HANLY, MARIE H. SUTHERS, AND HOWARD C. MEDLEY, SR., INDIVIDUALLY AND AS MEMBERS OF THE CHICAGO BOARD OF ELECTION COMMISSIONERS, FRANKLIN J. LUNDING, WILLIAM L. HARRIS, DON W. ADAMS, MICHAEL E. LAVELLE, MICHAEL LEVINSON, DON HAGEN, DELMAR WARD, INDIVIDUALLY AND AS MEMBERS OF THE STATE BOARD OF ELECTIONS, AND JOHN MARCIN, INDIVIDUALLY AND AS CITY CLERK OF CHICAGO,

Defendants.

No. 77 C 255

EMERGENCY MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION AND OTHER RELIEF

Pursuant to Federal Rule of Civil Procedure 65 (a) plaintiffs respectfully move this Court for a Preliminary and Permanent Injunction, restraining defendants, their agents, successors, attorneys, representatives, and those acting in concert with them, from enforcing those portions of Ill. Rev. Stat. Ch. 46, §§ 10-2 and 10-6 relating to the signature requirements and filing deadlines for nominating petitions for new political parties as defendants have announced those provisions are to be applied to the Special Mayoral Election scheduled for June 7, 1977. Plaintiffs also respectfully move this Court for a declatory judgment that §§ 10-2 and 10-6, Ill. Rev. Stat. Ch. 46 are unconstitutional as applied.

In support of these motions, plaintiffs state as follows:

1. Plaintiff Socialist Workers Party seeks ballot status as a new political party in the Special Mayoral Election of June 7, 1977. Plaintiff Social Workers Party's mayoral candidate desires to run as a candidate of a new political party for Mayor of the City of Chicago. Plaintiffs Michael Taber and John Doe desire to circulate petitions on behalf of Socialist Workers Party's candidate for Mayor and to support the candidate of the Socialist Workers Party in that election.

2. The 1977 Election Calendar for Chicago, prepared and issued on or about January 14, 1977 by defendants pursuant to Ill. Rev. Stat. Ch. 46, §§ 10-2 and 10-6, requires individuals desiring to form a new political party for the Special Mayoral Election to secure and file petitions with 63,373 signatures by April 4, 1977.

3. Although plaintiffs believe that §§ 10-2, requiring new political parties to collect signatures on nominating

petitions at least equal to five (5) percent of the number of votes cast in the next preceding general election, to be in itself burdensome and discriminatory to minority parties, plaintiffs are only challenging the requirements as they apply to the Special Mayoral Election in the City of Chicago on June 7, 1977. Plaintiffs are challenging these requirements as applied to the Special Mayoral Election because of the special circumstances surrounding it and specifically because they have been denied sufficient notice and adequate time in which to secure the required number of signatures.

4. Without any compelling, necessary or even rational governmental interest, defendants have imposed extremely high signature requirements upon plaintiffs, while denying them sufficient notice and a reasonable time period in which to secure them.

5. The Socialist Workers Party fulfilled the requirements of §§ 10-2 and 10-6 of the Election Code and was certified for the ballot in the April 1, 1975 Mayoral Election in the City of Chicago. On January 27, 1975 the Socialist Workers Party filed 66,243 signatures on nominating petitions—(41, 403 valid signatures were required). There is every reason to believe that the Socialist Workers Party could fulfill the present requirement of 63,373 signatures if they were given a reasonable time period in which to secure them.

6. The Socialist Workers Party was the first new political party to achieve ballot status in a Mayoral Election in the City of Chicago under the provisions of §§ 10-2 and 10-6 of the Election code and is therefore knowledgeable concerning the amount of time, resources and preparation necessary to do so. For the April 1, 1975, Mayoral Election a period of five full months was necessary.

7. Under usual election procedures, no date is specified for the opening of the petitioning period, allowing a new party or independent candidate sufficient time to prepare, plan and collect the necessary number of signatures. In the upcoming June 7, 1977 Special Mayoral Election, the date for the election, and the election calendar, was set on January 13, 1977. Petitions for a new political party must be filed by April 4, 1977, allowing only 81 days to prepare for and secure the required 63,373 signatures. This compares with 41,403 signatures required in the April 1, 1975 Mayoral Election, with no time restriction. The plaintiffs claim that the time restrictions imposed by the Special Election are burdensome and discriminatory and would exclude the Socialist Workers Party as a new political party from ballot status in the June 7, 1977 election, despite their demonstrated ability to fulfill the requirements under usual circumstances.

8. In view of the extremely short notice which plaintiffs received of this Special Mayoral Election, the effect of both the signature requirements and the time period in which these requirements must be met will be to prevent these plaintiffs from effectively organizing to seek ballot position and further express their political ideas in this campaign. In view of all the circumstances, the requirements for ballot position formulated by the defendants place an unnecessary and unconstitutional burden on plaintiffs' ability to engage in the electoral process. Such requirements deny plaintiffs their rights under the First Amendment and deny plaintiffs equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution.

9. The special circumstances of this election justify a reduction in the number of required signatures and an extension of the deadline for filing.

10. Unless a preliminary injunction is entered which reduces the number of signatures required and extends the time period in which the signatures can be gathered, plaintiffs will be deprived of their constitutional rights to meaningfully participate in this election and thereby suffer irreparable harm.

11. Well-established principles of equal protection law and several recent federal District Court decisions regarding the right of a new party and independent candidates to gain ballot position make it evident that these plaintiffs have a substantial likelihood of prevailing on the merits of this case.

12. It is obvious from the facts that insufficient time has been allowed for collecting the massive number of signatures required for the Mayoral candidacy. An important consideration in decisions allowing high signature requirements to stand has been the sufficiency of the time period allowed in which to gather them. *Jenness* v. *Fortson*, 403 U. S. 431, (1970). (Six months in the State of Georgia). No such extended time period is afforded to plaintiffs herein.

13. No significant harm will be caused to defendants by requiring them to accept as valid those nominating petitions for a new political party candidate containing a lesser number of signatures than currently required in the 1977 Election Calendar, and no significant harm will be caused by requiring them to extend the filing deadline. On the other hand, plaintiffs will suffer irreparable injury if a more equitable balance between the number of signatures required and time in which to collect them is not achieved.

19. The State of Illinois and the defendants herein have no special or valid interest in the premises justifying the imposition upon these plaintiffs, as a new party for the purpose of running a candidate for the office of Mayor

of the City of Chicago, the unconstitutional burdens and restrictions as are provided for in the statutes and laws of the State of Illinois complained of herein.

20. Ch. 46, Ill. Rev. Stat., 1973, § 10-2 is unconstitutional as applied. Plaintiffs have moved this court to make determinations in this cause on the merits concerning the constitutionality of the foregoing statute (construed with § 10-6) as applied, for the following reasons:

(i) Plaintiffs present this Court with substantial federal questions for determination;

(ii) Plaintiffs attack statutes having statewide application on constitutional grounds:

(iii) Plaintiffs seek to enjoin enforcement of the statutes of which they complain.

21. Plaintiffs bring this action to compel Defendants to recognize the Socialist Workers Party as a new political party under the terms of the Illinois Election Code (*Ill. Rev. Stat. Ch. 46*, 1973) and to require Defendants to give plaintiffs a place on the ballot in the June 7, 1977 Special Mayoral Election. Plaintiff party polled less than 5 per cent of the total vote cast in the last preceding general election and therefore, under the laws of the State, *Ill. Rev. Stat., Ch. 46, s 10 et seq.* (1973), is compelled to nominate its candidate by petition.

22. Plaintiffs are the Socialist Workers Party of Illinois, and supporting voters on behalf of other voters who wish to vote for the Mayoral candidate of the Socialist Workers Party. The Socialist Workers Party of Illinois is an unincorporated voluntary association having its principle office in Chicago and is the Illinois Division of the Socialist Workers Party of the United States, a national political party. Individual plaintiffs are duly registered voters who desire Plaintiff Socialist Workers Party and its

candidate to appear on the ballot at the 1977 Mayoral Election and desire to vote for the candidate of the Socialist Workers Party.

23. Defendants are members of the State and Municipal Boards of Elections and the City Clerk of the City of Chicago, responsible for the certification and recognition of new political parties and the placement of all candidates on the ballot in the 1977 Mayoral Election. They are barred from recognizing Plaintiff Party as a new party and from placing its candidate on the ballot by the Election Code Provisions challenged here.

24. Plaintiffs sue pursuant to 28 U. S. C., §§ 1331, 1343, 2201, 2202, as well as 42 U. S. C. 1983.

25. The Court must consider the constitutionality of these statutes having statewide application which are attacked on grounds of their constitutional invalidity as applied. Moreover, Plaintiffs raised substantial federal questions concerning the statutes, and seek a judgment declaring the state statutes unconstitutional as applied to protect against the further enforcement of the statutes by state and municipal officials. *Ex parte Poresky*, 290 U. S. 30 (1934); *Phillip* v. *United States*, 312 U. S. 246 (1941); *Communist Party* v. *Ogilvie*, 357 F. Supp. 105.

WHEREFORE, Plaintiffs respectfully request this Court to enter an order mandatorily enjoining Defendants from enforcing §§ 10-2 and 10-6, Ill. Rev. Stat., Ch. 46 in the Special Mayoral Election and plaintiffs also ask this Court to fashion relief as it deems appropriate.

Respectfully submitted,

/s/ _____

LANCE HADDIX

Attorney for the Plaintiffs

33 North Dearborn
Suite 815
Chicago, Illinois 60602
(312) 263-7344

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants.

No. 77 C 326

ORDER

The Chicago Board of Election Commissioners and the Illinois State Board of Elections having agreed, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 35,947 signatures.

(B) That the last date for filing as an independent candidate in the Special Mayoral Election, pursuant to Ill. Rev. Stat., Ch. 46, Par. 10-3, shall be April 4, 1977.

(C) This Order is without prejudice to the parties contesting any of the remaining issues in the case.

Enter:

/s/ Bernard M. Decker
Judge

Dated: Feb. 11, 1977.

TRANSCRIPT OF PROCEEDINGS—FEB. 11, 1977

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs,
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants.
GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN HANLY, et al.,
Defendants.

No. 77 C 255
and
No. 77 C 326

Before the HON. BERNARD M. DECKER, Judge, on Friday, February 11, 1977, at the hour of 10:00 o'clock, a. m.

PRESENT:

MR. JEFF COLMAN,
on behalf of the plaintiffs;

MR. IAN H. LEVIN,
MR. LANCE HADDIX,
MR. MICHAEL L. LEVINSON,
on behalf of certain defendants, as herein shown.

THE CLERK: 77 C 326, Rose vs. Hanly; plaintiffs' [2] motion for leave to file memorandum in support of motion for preliminary and permanent injunction and in opposition to defendants' motion to dismiss in excess of 15 pages.

(The following proceedings were had herein, in open court, as follows:)

MR. COLMAN: Good morning, your Honor.

THE COURT: Good morning.

MR. COLMAN: Jeff Colman for the plaintiffs Rose, et al.

THE CLERK: And there is a motion in a companion case, 77 C 255, Socialist Workers Party vs. Chicago Board of Election Commissioners; an emergency motion for preliminary injunction and other relief and brief in support.

MR. LEVIN: I wasn't served with that, Judge, but, at any rate, I'm waiving any notice, Judge. I don't mean to—I haven't been served with this brief either, Judge.

I would just like to say this for the record, my name is Ian Levin representing the Chicago Board of Election Commissioners, and, as I noted the other day, Tuesday when we were in court and were first noticed in, given notice at 4:00 o'clock on Monday afternoon, and the State Board was not notified and the State Board, because they are—even though it is a challenge solely applied to this special mayoral election, the state, there [3] are state statutes involved and the attorney for the State Board is here, Mr. Michael Levinson. I would just like that for the record, too, Judge.

THE COURT: Well, first of all, somebody wants leave to file a brief?

MR. COLMAN: Yes, your Honor. It's 28 pages long and it is a memorandum in opposition to the defendants'

motion to dismiss and also in support of our motion for preliminary and permanent injunctive relief. So, it is really two memoranda.

MR. LEVIN: I haven't seen it, Judge, I mean, it is—I will try to read it, just as well as I am sure you will, if it is—I don't know what the Court's policy is on it, Judge. I don't know.

THE COURT: Well, I am generally presented by these after they are prepared. There is a lot of paper going to be wasted.

MR. HADDIX: Your Honor, my name is Lance Haddix; I'm representing the SWP.

I likewise am asking leave to file a motion for injunctive relief and other relief as well, that is, as well as a brief in support.

THE COURT: Well, do you need an additional brief, in addition to this?

MR. HADDIX: There are two sets of plaintiffs.

[4] THE COURT: Two sets of plaintiffs?

MR. HADDIX: Yes.

THE COURT: Well, why do I need a double-barreled presentation? Can't you gentlemen get together?

MR. LEVIN: I say the same, Judge.

MR. COLMAN: These are two cases, your Honor.

THE COURT: I know that. I know that they are two cases.

MR. COLMAN: That are consolidated.

THE COURT: I know that they are two cases but aren't they the same issues? Don't they involve the same issues?

MR. COLMAN: They involve similar issues, yes.

MR. COLMAN: Your Honor, we would like this matter set at your earliest convenience for a hearing on the preliminary injunction.

MR. LEVIN: Judge, I might be able to help a little bit here.

THE COURT: All right.

[6] MR. LEVIN: Because—I think that this will expedite things a little bit in the case: I've talked to the State Board of Election attorney and while we think as to this matter that I am going to talk to you about, I don't think that there is a constitutional issue as to it, but I think that we have some responsibility as an election authority to be neutral and to help people get on the ballot rather than to be obstructive, and I don't know—and we were not obstructive here, we just implemented the statute and the next thing we know there are court suits filed. No one ever gave us a demand or anything.

But, be that as it may, for new political parties, Judge, the signature requirements for April 4th as it was published is 63,000-plus signatures. That was keyed—that's the way that it was, I mean, the five percent figure was, under the statute, is as it was always done, the way that it has always been done since the inception of the election code.

I'm sympathetic to the problems that this is a special, as they complained, in this special particular situation, because—

THE COURT: They aren't getting enough time?

MR. LEVIN: Because there is a six month statute, they don't have as much notice.

[7] I've talked to the State Board of Elections and without prejudice to any of the other issues in the case, any of their other issues in the case, we will unilaterally—we do

MR. LEVIN: They should, otherwise they shouldn't be connected cases.

THE COURT: I'm not going to—if they are, I mean, I'm not going to take two briefs. I mean, do you have another brief right there ready?

MR. HADDIX: Your Honor, there are two separate cases here.

THE COURT: I understand that but they involve the same issue.

MR. HADDIX: They involve similar issues, your Honor. One is suing on the part of independent candidates of one party, we are suing on another political party.

[5] MR. LEVIN: It is the same issue.

THE COURT: Well, I mean, it is the same issue exactly, the name of the party doesn't mean anything.

MR. COLMAN: Just for a point of clarification, your Honor, as I understand it, Mr. Haddix is representing only a new political party or established party in his view, possibly, but we represent both a new political party and an independent—independent candidate, and they are—

THE COURT: Well, how long is your brief?

MR. HADDIX: 12 pages, your Honor.

THE COURT: Well, all right. I will give you leave on that. I will give you leave to file it. You at least cut yours down.

MR. HADDIX: Thank you.

THE COURT: All right. Now—

MR. COLMAN: Is leave granted—

THE COURT: Do you expect me to hear something this morning?

unilaterally agree to an order by his Honor that the signature requirement for new political parties on April 4th be the same as independent candidates, which is 35,000-plus signatures, and I think that that is fair and that's an effort to try to help these people get on the ballot and that, I think, removes the problem—and I am not speaking for these people; one of the reasons for—it seems like there is a move for a preliminary injunction and it is that their candidate—

THE COURT: Well, have you discussed this with these gentlemen?

MR. COLMAN: Your Honor, may I respond to this just briefly?

MR. LEVIN: Let me just finish up. I'm not trying to—you will get a chance to respond because this—it seems to me that the independent candidate is really trying to get on either as an independent candidate, but he would have to file by next Friday 35,000 but if it is made April 4th, which is a new political party, which he really is a candidate of the Labor Party, it would put it in a posture of 35,000, so we are prepared, and I have consulted with the State Board, and we unilaterally agree, regardless of what they say and [8] regardless of what the other issues are and without prejudice to our contesting the other issues, because we do think that the other issues can be defended, we are going to agree to a 35,000-plus figure for the political parties.

MR. COLMAN: I just want to clarify a few things: Are you agreeing to 35,000 for independents and third parties and an April 4th filing date for both?

THE COURT: That's what he said.

MR. LEVIN: Well, I will agree to that if you feel that it is necessary for independent candidates. As I understood it—

THE COURT: Well, somebody was shaking his head "yes," is that—

MR. LEVIN: I was. I agree with that. I just said it might be moot. You see, Judge—

THE COURT: Well, he says—

MR. COLMAN: Well, this is what I would like to finish and clarify.

MR. LEVIN: Okay.

MR. COLMAN: If they are agreeing to April 4th and 35,000 for independents and for third parties—

THE COURT: They are.

MR. LEVIN: Yes.

MR. COLMAN: Then that clarifiies one issue in this [9] case. And it certainly, as they say, must be—

THE COURT: It removes the emergency.

MR. COLMAN: It removes an emergency for today and for next week.

Your Honor, in our complaint we set forth what we believe are substantial constitutional reasons why 35,000 is too much and if they are going out seeking 35,000 signatures now that's a burden on their rights, on their First Amendment rights, and it is something that we would want a hearing on. It doesn't have to be Monday but we would like it within ten days.

THE COURT: Well, don't y[illegible]k that you have got—

MR. LEVIN: Judge, I'm not trying to avoid a hearing, I want to make that clear. I am [illegible]g to go to a hearing today. I am not doing it for that r[illegible]n.

I am doing that without prejudice—if they want to contest the other issues, that's fine. We feel that they are contestable.

THE COURT: Well, you have an offer and all yon have got to do is accept it.

MR. LEVIN: It is not even an offer; I offer—we make it unilaterally, Judge, because I think that that's the way that it should be and it is right and I will draft an order that says that the filing date for independent candidates is April 4th and that the signature requirements [10] for new political parties on April 4th is 35,000 signatures, without prejudice to either party to defend the other issues, which we feel can be defended.

MR. COLMAN: We certainly have no objection.

MR. LEVIN: Fine. All right.

THE COURT: All right. Then what's the—

MR. LEVIN: I would like to respond. I haven't seen these 40 pages of briefs.

THE COURT: Well, you can respond to these and I will give you equal time.

MR. LEVIN: I would like—can I have 14 days, Judge? This came up in such a rush. Does that give you—

MR. COLMAN: I would appreciate if you would make it seven days and four days for us to reply and then set it for a hearing.

MR. LEVIN: How about 10 days, Judge?

THE COURT: All right.

MR. LEVINSON: May I address the Court?

THE COURT: Yes.

MR. LEVINSON: My name is Michael Levinson and I represent the State Board of Elections.

We have a board meeting scheduled for February 17th. Although I have spoken to the chairman of the State Board about the case and received some authorization from him,

I'd like to present the matter to the full [11] board. We have conferred with the Attorney General's office and they have consented for the State Board to represent themselves in this matter.

Given my problems in terms of getting authorization from the board and the briefing schedule, seven days or even ten day's limitation, I would suggest to your Honor, is too restrictive and too restrained, given the fact that they have until April 4th to file the requisite number of signatures, and they may very well get the signatures, I think would be taking up the Court's time as well as counsel's time to argue premature issues and for that reason I would ask at least a 20 day period in which to answer the briefs and only as to the issues that we have not stipulated to, which would be the five percent signature requirement.

MR. LEVIN: The five percent signature requirement and the 64 day time filing requirement. We feel that they are wholly defensible. Those are the two remaining issues, We would like to address ourselves to that.

MR. COLMAN: Your Honor, there are additional issues. I would just like to state for the record so your Honor is aware of this that it is our position that the burden is being suffered now and that simply because these people may not be able to get 35,000 signatures, or may be able to get it, does not in any way alleviate the [12] fact that they are operating under First Amendment constraints now and that's why we think that the 20 days is too long.

I would urge that your Honor give them five or seven days, give—

THE COURT: Well, I am going to give then 14 days. I mean, you filed a 28 page brief and another brief here, 12 pages, and you say that there are some important, you say, constitutional questions.

MR. COLEMAN: There certainly are.

MR. LEVIN: We don't think that there are.

THE COURT: What's that?

MR. LEVIN: We don't think that there are, for the record.

THE COURT: Well, I understand that. I undestand you deny that. So, 14, and if you want, you can take 14 or five, I mean, either seven or five.

MR. COLMAN: We will take five.

THE COURT: All right. 14 and five.

I will get the briefs and then I will attempt to give you a date.

MR. LEVIN: Either that or rule, Judge, because you have to rule on the motion to dismiss; if the motion to dismiss is granted the case is over and if it is not then they have to set a hearing to prove some other [13] matters.

THE COURT: All right. Well, I am—that is right. The motion to dismiss—

MR. COLMAN: Your Honor, just on that point I'd like to say that I think that your Honor will either grant the motion to dismiss or grant the motion for preliminary injunction, it will be one or the other. I don't think that there are going to be many questions of fact to be presented.

THE COURT: I wouldn't think so.

MR. COLMAN: So, could we have this set for a hearing date?

THE COURT: I will set it for a date sometime later after I get the briefs. I mean, after I look at the briefs.

THE CLERK: The same schedule in both cases?

THE COURT: Yes.

MR. LEVIN: Yes.

[8] THE COURT: All right.

MR. LEVIN: We are not going to brief the issues that I've agreed to in the, you know, for the purposes of the order.

THE COURT: You are going to only brief the remaining issues?

MR. LEVIN: That is right.

THE COURT: Yes.

MR. LEVIN: Judge, do you want me to come back with an order so that it can be drafted in a way that is—

THE COURT: Well, you have already made your representations.

MR. LEVIN: Okay

THE COURT: All right.

MR. LEVIN: Because I have got it handwritten; I could have it handwritten and then give it to the clerk.

THE COURT: Well, if you want to—well, what is the order going to say?

MR. LEVIN: It's just going to say—

THE COURT: That unilaterally—

MR. LEVIN: Yes, that as applied to—yes, that the Chicago Board of Election Commissioners and the Illinois State Board—

THE COURT: Would you like an order?

MR. LEVIN: What's that?

THE COURT: I am asking counsel.

MR. COLMAN: Yes, your Honor, we would.

THE COURT: All right. Bring in the order.

MR. LEVIN: Okay. How about this afternoon? I will have it here. I will have it ready.

THE COURT: All right. I will be here.

MR. COLMAN: We, of course, would like to have a [15] chance to review it.

MR. LEVIN: Yes. I have no objection to that.

THE COURT: Go ahead, review it together before you come back.

MR. LEVIN: I want to make sure it is done correctly.

THE COURT: All right. Fine.

MR. COLEMAN: Thank you, your Honor.

MR. LEVIN: Thank you, Judge.

THE COURT: Yes. All right.

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al., *Plaintiffs,* vs. CHICAGO BOARD OF ELECTION COMMISSIONERS, et al., *Defendants.*	}	— No. 77 C 255 —

ORDER

This mater coming on to be heard by the Court, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 20,000 signatures.

(B) That the last date for filing as a new political party in the Special Mayoral Election shall be April 18, 1977.

ENTER:

/s/ BERNARD M. DECKER
Judge

Dated: March 17, 1977.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants.
No. 77 C 326

This matter coming on to be heard by the Court, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 20,000 signatures.

(B) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-3 to qualify for placement on the ballot as an independent candidate in the Special Mayoral Election shall be 20,000 signatures.

(C) That the last date for filing either as a new political party or as an independent candidate in the Special Mayoral Election shall be April 18, 1977.

ENTER:
/s/ BERNARD M. DECKER
Judge
Dated: March 17, 1977.

TRANSCRIPT OF PROCEEDINGS - MARCH 17, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALISTS WORKERS PARTY, et al.,
Plaintiffs,
vs.
CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendants.
No. 77 C 255
and
GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN HANLY, et al.,
Defendants.
No. 77 C 326

Before the HON. BERNARD M. DECKER, Judge, on Thursday, March 17, 1977, at the hour of 2:00 o'clock, p.m.
PRESENT:

MR. JEFF COLMAN,
MR. WILLIAM H. LUKING,
on behalf of the plaintiffs;

MR. IAN LEVIN,
MR. MICHAEL L. LEVINSON,
on behalf of certain defendants.

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[17] MR. COLMAN: Good afternoon, your Honor.
THE COURT: Good afternoon.
MR. LEVIN: Good afternoon, Judge.
THE COURT: Good afternoon.

MR. COLMAN: Jeff Colman and Bill Luking here for plaintiffs in 77 C 326.

MR. LEVIN: Ian Levin on behalf of the Board of Election Commissioners of the City of Chicago in both 77 C 326 and C 255.

I suppose the first thing, I think the first thing before we get into some of the other matters, is that I formalized the order that was agreed to in the pretrial conference which would deflect 20,000 signatures for both independent candidates and new political parties, solely as applied to the special mayoral election, and a last date for filing is April 18th, 1977.

I have an order in each case which would just reflect that portion of it, Judge, and I wonder if I could—I tendered it to each party and I wonder if they could just—

THE COURT: Well, are you now talking about both cases or just one case?

MR. LEVINSON: Well I though it would apply to both cases although I guess Mr. Riosti has his own statement to make on that case.

[18] MR. RIOSTI: If your Honor please, I have a plane that I would like to make and I have only two brief statements to make.

THE COURT: All right. I will hear from you. Fine.

MR. RIOSTI: Okay. With regard to the merits of the case involving the Socialist Workers Party, after consultation this morning and consultation with my clients, we would not ask this Court for a hearing but we would ask this Court for leave to submit an offer of proof in writing next week. I think that we could have it filed by Wednesday at the latest, given time for the mails, and we would rest our case on that offer of proof and arguments as to why that offer of proof should be persuasive.

THE COURT: Well, I am willing to have that offer of proof submitted. In the meantime, why you had better collect signatures.

MR. RISOTI: I have explained that to my clients.

THE COURT: All right.

MR. RIOSTI: Now, your Honor, I have one other statement to make with regard to the State's motion and that is merely that my clients in our case would adopt the argument of Gerald Rose, et al., in the companion case in these consolidated cases.

THE COURT: All right. Fine. I will hear then [19] I will hear that argument.

MR. RIOSTI: If your Honor wouldn't mind and would give me leave, I will leave.

THE COURT: I will give you leave.

MR. RIOSTI: All right. Thank you.

MR. LEVINSON: Judge, just on the matter of—I don't know if it is necessary for me to respond and I don't know whether I should ask for time or whether—if you feel that it is necessary, I would rather that you order me.

THE COURT: I will not ask for a response unless I have some difficulty.

MR. LEVIN: All right. Thank you. I have briefed myself out in this case.

THE COURT: All right. Fine.

MR. COLMAN: Just in response to your Honor's question then, I think that the order—I am certain that the order we are submitting to you now would apply to all third parties or independents who want to go out and get ballot placement.

THE COURT: I think it should.

MR. COLMAN: And get ballot placement, including Mr. Risosti's client.

THE COURT: Yes. He will get the benefit of it without agreeing to it.

[20] MR. LEVIN: That is right. That's why I made the order for both cases, Judge.

THE COURT: All right. Fine

MR. LEVIN: May I submit the originals to you?

THE COURT: Yes

(Tendering documents to the Court.)

THE COURT: Now, before I enter this perhaps we had better take up the State's motion to vacate the main, I mean, my memorandum opinion and discuss that briefly and if you want to make any argument over and above what you have given me, what you made back in chambers, why, I mean, back in chambers this morning, of course I will hear from you then.

In effect what you are asking me to do or what you are telling me, as I interpret what you are doing, is that I've misinterpreted the effect of Jackson vs. Ogilvie and that Jackson vs. Ogilvie still represents the law and that you think that the staute says, as they stand, were constitutional and that I was in error when I said that I could find no rational basis to a stricter requirement for a city election than there is for a state wide election?

MR. LEVINSON: That is true in part, your Honor, and I appreciate the opportunity of this honorable Court and with all due respect I thank you for allowing me to [21] at least make my statements for the record.

THE COURT: Well, I certainly want you to make your statement for the record. You go ahead and make them and then I will get a response from these gentlemen.

MR. LEVINSON: Well, again, I thank you, your Honor.

Okay. Our motion is grounded on two basic factors: One, that our interpretation of the Federal Rules of Civil Procedure is that prior to the entry of permanent injunction a hearing may be held and if in fact the plaintiffs in this case, and we were a named party in the Socialist Workers Party; we are at least an indispensable party in the Gerald Rose case, and if we are to defend the legitimacy and legality of the state statute we would have, we should have the opportunity to defend the statute, or else it is just a private agreement between the Chicago Board and the plaintiffs in this suit.

Our interpretation—

THE COURT: You were a party in one action and not in the other, is that right?

MR. LEVINSON: That's true but we signed a stipulation with regard to the Gerald Rose case, which in fact made us a party to that case. We were in court and we were a party to the agreement to extend the filing deadlines for independent and new political party candidates to [22] April 4th. We signed that stipulation. It was binding in both cases.

It is our position, your Honor, with all due respect, that prior to a preliminary injunction being ordered, were the plaintiffs to escape the constraints of the United States Supreme Court, which specifically upheld the issues and the statutes at issue in this case, to be constitutional, they have to prove a case that the special election in the City of Chicago is some peculiar circumstance whereby this Court would have the authority to go outside the Supreme Court decisions.

They have not presented any case. We have had no opportunity to defend. We feel that there are—and I think that this Court can take judicial notice of the fact—that special

elections, both municipal, township, and whatever, are held throughout the state. The state statute provides that indedendent nominating petitions as well as new political party petitions have to be filed before 64 days prior to the election.

The stipulated order which is on your Honor's desk is a result of a private agreement to violate state law. I don't think that the Chicago Board has the authority to extend filing deadlines, especially in view of the Supreme Court's decision upholding the constitutionality of that provision.

[23]If, however, this Court feels that the special election presents some situation that would bring us without the confines, I think that they are required under federal rules to present the case and the state is also allowed to present its record, to defend, to show why the special election in the City of Chicago is no different than any other special election throughout the state.

So the two basic reasons, to summarize, is, one, we have never had an opportunity to present a defense, the plaintiffs have never presented any evidence to warrant a preliminary —a permanent injunction being established, which I think the rules call for, some evidentiary hearing, and more than that, I think that the matter is res judicata by the U.S. Supreme Court.

THE COURT: Let me ask you this, were you furnished copies of the briefs in this case? In these cases? Were you furnished copies?

MR. LEVINSON: I was only furnished a copy of the petition and I signed a motion to dismiss the complaint. That's all.

THE COURT: Well, what about the briefs in the case, though? Weren't you furnished copies? Weren't you aware of the briefs that were filed?

MR. LEVINSON: Not all the briefs. The negotiations went on between—no, all of the negotiations [24] went on between the Chicago Board of Election Commissioners and the plaintiffs.

THE COURT: Well, were they, in effect, representing you?

MR. LEVINSON: Not entirely.

MR. COLMAN: He is not talking about negotiations he is talking about briefs.

THE COURT: Briefs.

MR. LEVINSON: I understand what the Court said. Thank you.

THE COURT: Well, what I was asking you—

MR. LEVINSON: I was given the brief after it was typed—

THE COURT: I would assume that as a party to the litgiation you received copies of the—

MR. LEVINSON: Only after they were all—only after they were typed.

THE COURT: Well, I mean, well, that's what I am talking about. I am talking about the briefs that were furnished by the parties filing the action.

MR. LEVINSON: The plaintiff's briefs?

THE COURT: Yes.

MR. LEVINSON: Yes, I received copies of the plaintiff's briefs.

[25] THE COURT: That's what I am asking about.

MR. LEVINSON: But that is only relating to the motion to dismiss the complaint and the—

THE COURT: Well, let me say this, and I am aware, of course, of the fact that under ordinary circumstances

where an injunction is going to be issued there is usually—usually there are some factual questions involved that require some kind of a hearing. I interpreted what was filed in this case as, actually, a motion, in effect, for what would amount to a, in effect, a summary judgment based on the admitted facts, based on the working of the statute as such and I decided no questions of fact except the fact that five percent means so many voters and I've decided—and I know of the existence of the statutes and the extent of the decision. You are not bound by any factual, any factual determination that I have made.

MR. LEVINSON: You have made no factual determination, your Honor.

THE COURT: No, no. And so—

MR. LEVINSON: But I maintain—I am maintaining that there has to be a factual determination—

THE COURT: Well, tell me what—I mean, I am basing this entirely on what I have—on the admitted, I mean, on what the admitted effect of the present statute is in [27] argued in the Jackson vs. Ogilvie case.

We were challenging—

THE COURT: I guess somebody in a brief—

MR. COLEMAN: One sentence.

THE COURT: Found one sentence in a brief and it got lost.

MR. LEVINSON: Judge, I haven't joined in this motion but I—

THE COURT: Was that your brief?

MR. LEVINSON: Yes, Judge. I felt that it was raised in the case—

THE COURT: It was raised but then no one discussed it.

MR. COLMAN: Never.

MR. LEVINSON: It was not—it was not discussed in the opinion but the state, who actually argued for the unconstitutionality of the statute, although they were a defendant in the case, did raise that issue and I did make a point.

THE COURT: You say that they argued—for what?

MR. LEVIN: They argued in that, in Jackson vs. Ogilvie, they filed their brief and it is attached as an appendix, arguing that the statute was unconstitutional rather—even though they are a nominal defendant, and they did argue in their brief that distinction and I tried [28] to—

THE COURT: That is was unconstitutional on what basis?

MR. LEVIN: On the ground, that there was—that it would require almost 60,000 for an independent in Chicago and only 25,000 to form a new political party or run independent state-wide, and that is in my reply, my reply brief, and I did try to make the point at the time, which your Honor in his opinion, you know, for reasons stated, didn't adopt. But that was there. That was raised.

MR. COLMAN: Well, it is a—

THE COURT: Well, you go ahead and finish your statement.

MR. COLMAN: It is axiomatic, as your Honor knows, that just because a statute has been upheld against one constitutional challenge does not mean that it is immune from new constitutional challenges.

And as your Honor points out in the opinion, neither the majority nor Judge Pell in his dissent in Jackson vs. Ogilvie discussed the constitutional challenge that we raised in this case.

I'd like to add just two other points. First of all, the defendants in this matter were on notice of our motion for preliminary injunction. We filed it almost four weeks ago. So that they can't say that they [29] didn't have notice that we wanted judgement on the claims that we were making.

MR. LEVINSON: A preliminary injunction.

THE COURT: Yes. All right, Well, go ahead.

MR. COLMAN: Secondly—well, as far as that is concerned, your Honor is correct, there is no question of fact, it is a pure interpretation of the statute against an equal protection argument.

Finally, Mr. Levin is here—

MR. LEVINSON: Mr. Levinson?

MR. COLMAN: Mr. Levin—

MR. LEVINSON: Oh, I am sorry.

MR. COLMAN: Is here representing three defendants that your Honor has entered an injunction against. He does not oppose that injunction at the present time. We have worked out an agreement in this matter.

Mr. Levinson does not represent the people that you have enjoined and I don't think that he has standing to even come before you today and argue that the injunction against Mr. Levin's clients is improper.

THE COURT: Well, he certainly has standing to the effect that, I mean, to the extent that I have held a state court, that is, a state statue, unconstitutional where he—the legislature is going to have to take some action to cure this, in the future, at least, and, I mean, [30] I—

MR. LEVIN: Your Honor?

THE COURT: Yes?

MR. LEVIN: I just wanted to clarify one thing, your Honor. For the record, Judge, I did not join in the motion.

I didn't want the record to reflect to say that I do not oppose, I mean, that I oppose the motion. I have never said that I have not joined in it today. I just wanted to have the record show that.

THE COURT: Well, the record will show that.

MR. LEVIN: All right. Fine.

THE COURT: Well, tell me what kind of a hearing you envisage. I don't want to—I certainly don't want to deprive you of anything that you think that you are entitled to.

MR. LEVINSON: We think, your Honor, and we only suggest—and, again, it is a—

THE COURT: It probably isn't going to affect this particular election but—

MR. LEVINSON: In all due respect to this Court, and I again appreciate the consideration of the Court for allowing me to address the Court on this matter, but if in fact the plaintiffs are attempting to avoid the constraints of the United States Supreme Court which has specifically held by affirming the judgment of the [31] Seventh Circuit, that our statute does not violate the equal protection of the laws clause of the Fourteenth Amendment, that they have to present a case before your court and we have to have an opportunity to present our defense that it does not on its facts distinguish it from the holding set forth in Jackson vs. Ogilvie.

THE COURT: I have held, in effect, that there is a difference.

MR. LEVINSON: But that is a factual determination.

THE COURT: That this is a special election, that by reason of—I have pointed it out. If you have read—you have read this, I am sure.

MR. LEVINSON: Yes, yes, I have, your Honor.

THE COURT: And I have pointed out what the differences are as applied to a special election and a general election.

MR. LEVINSON: But I think that we are entitled, your Honor, for them to prove those facts. I don't think that one can assume—

THE COURT: To prove what, for example?

MR. LEVINSON: Well, the mere fact that we have a special election does not—

THE COURT: Not prove it, they can argue the point; that's what they have done, they have argued the point and they have convinced me that under the circumstances that have been alleged here that the statute certainly [32] can't properly apply. I mean, I—

MR. LEVIN: Judge, may I just—

THE COURT: Can you suggest to me a rational basis, as long as we are talking the law?

MR. LEVINSON: Yes, I can, sir.

THE COURT: Well, all right. Go ahead.

MR. LEVINSON: Since there are special elections held throughout the State of Illinois—

THE COURT: Well, all right.

MR. LEVINSON: And in your instance if you—

THE COURT: But in the City of Chicago the application of it requires how many—would require how many signatures?

MR. LEVINSON: Approximately 32,000.

THE COURT: All right. 32,000. 32,000 as opposed to 25,000 if you are going to run state-wide in the whole State of Illinois, and you think—and you think that it would

require more signatures rationally in the City of Chicago for a single election here than you can for the state, for the whole State of Illinois?

MR. LEVINSON: That's what the Supreme Court has held. The United States Supreme Court has upheld the constitutionality of the five percent signature requirement in the city of election. The City of Chicago election.

MR. COLMAN: Not against the challenge that your [33] Honor has just brought to him. He has not—

THE COURT: I will give the Supreme Court a second chance at it. And so—

MR. LEVIN: Judge, may I ask one question, and it is a little off but—

THE COURT: Go ahead.

MR. LEVIN: There has been some confusion on this point in your opinion, which was very explicit, but on this one point, because we have been talking about special vs. general elections, is it your opinion that this permanent injunction is for this election or was that to be a permanent injunction for all elections?

THE COURT: Well, I think that it is a permanent injunction as applied to all elections insofar as—

MR. LEVIN: I mean, as to the future?

THE COURT: That is right.

MR. LEVIN: Future?

THE COURT: That is right.

MR. LEVIN: All right. Okay.

THE COURT: So, I don't know, if you need to file a response—I can find no basis at this time, but if you want to make—I am not sure what kind of a hearing we would hold, no more than what we are doing here today. I mean, I—

MR. LEVINSON: They would have to hold, your Honor, [34] the—how the filing date—apparently there is a stipulation on your desk extending the filing date. That filing date has been upheld by the Supreme Court of the United States. They have to set forth a factual basis why that date should be extended. They have no authority to extend the provisions of the state law.

THE COURT: Well, I have got to do something in order to take care of this special election and if you want to test the validity of this as applied to the state generally, of course, you are entitled to do so.

MR. LEVINSON: But your order—

THE COURT: I don't think that I am going to vacate the—not without some further showing from you that I reached the wrong conclusion but if you want to argue it further or present something more to me than you presented, I am not going to foreclose you from doing that.

MR. LEVINSON: Well, I think that we have—I think that it is incumbent upon the plaintiffs to present their case and then, because they are—

THE COURT: Do you have any evidence to present that you would present or which to present?

MR. COLMAN: There are no facts, your Honor. The situation is very simple. We are dealing with similarly situated individuals. If someone wants to run for mayor [35] of the City of Chicago—

THE COURT: Well, I understand that.

MR. COLMAN: Well, it is just a question of, is there a rational justification—the question that you put to Mr. Levinson before and he ignored your question, he didn't give you any rational justification.

He tried to argue that the United States Supreme Court had affirmed the constitutionality of the statute faced with that challenge, but they didn't and it wasn't a Seventh Circuit opinion which Mr. Levinson represented it to be, to begin with.

THE COURT: No, it was a three-judge court. The only member of the Seventh Circuit was Judge Pell who strongly dissented.

MR. COLMAN: That is right.

MR. LEVINSON: I would suggest then that we be given an opportunity to call a witness and present a record that the special election in the City of Chicago is no different than any other election in terms of the time requirement and the notice requirements and does violence to the other provisions of the election code and I'd like to present a record before the entry of a permanent injunction.

THE COURT: Well, the only thing I said about it was the difficulty is that in a general election everybody [36] knows in advance when you have got to get going; in this election no one knows until the moment comes and a death takes place or something like that and all at once your time starts and you have got to get moving.

In a general election I know now that I can start next week collecting signatures if I want to because I know—I know the filing dates and everything else but in a special election the whole machinery is changed for that purpose.

MR. LEVINSON: Well, we would like to present evidence that a special election that has to be called within six months is within at least three cases decided by the Supreme Court, is sufficient time. The mayor died in December and that's sufficient time and we would like to make a record that the special election in this instance gives ample

time to the plaintiffs to file their petitions and it creates—they are trying to argue that it does not. We would like to present a defense, factually through testimony, that a special election is no different than a regular election, that there is enough time to secure signature requirements.

MR. COLMAN: Your Honor, that would have absolutely no bearing on the equal protection judgment you have already entered, which has to do with the law as it is on its face.

[37] Mr. Levin and I have agreed, because of the constraints of the special election, to entry of this order by your Honor today.

One of our clients is here in court and one of the reasons why we are willing to forego any hearing on reduced numbers as set forth in your opinion is because they want certainty, they want to go out and try to collect signatures, they want to exercise their First Amendment rights.

MR. LEVINSON: Well, we would like the opportunity to present a record whereby a special election is no different than any other election because six months is required for the calling of an election. And we have not had the opportunity to do so.

THE COURT: Well, what about the—I mean, the filing date, the new filing date is by stipulation, is that right?

MR. COLMAN: It is by agreement, yes.

THE COURT: Or by agreement.

MR. COLMAN: Yes, your Honor.

MR. LEVIN: Judge, may I say something?

THE COURT: Yes.

MR. LEVIN: I am kind of in the middle of things.

I basically—I didn't join in the motion but I basically have some conception, I have conceptual [38] agreement

with the state, the State Board on some of these things, however, Mr Colman and Mr. Luking are perfectly right, and you were there this morning at pretrial, after the aftermath, that we had some very intensive negotiations and I in good faith, right or wrong—and Mr. Levinson doesn't feel that I have the authority—entered into certain things for this special election.

Our people, Judge, at the—they have a policy problem in the State Board and I think that they are right conceptually but we have the same sort of problem that they have as one of certainty; in other words, we have to know that—we have to get a whole—

THE COURT: Well, that's my whole problem.

MR. LEVIN: We have an election calendar, we have to—we are going to have to—we have done it once or twice already in this case and we have to get ready—

THE COURT: Well, so far as this special election is concerned my mind is made up.

MR. LEVIN: Yes.

THE COURT: That it is going to operate this way and I will take under advisement your motion to vacate and perhaps what you had better do is to make an offer of proof and let me find out what you want to do and then I can visualize what kind of a hearing we are going to have.

MR. LEVINSON: Well, when could I have a date on that, [39] your Honor? I'd like to get a witness on this because—

THE COURT: All right. Well—

MR. LEVINSON: Because the 64-day prior to the special election is set forth in the—

THE COURT: Well, what do you expect me to do in connection with this election?

MR. LEVINSON: Well, I would like to—

THE COURT: Adhere, adhere to the statute? Is this what you mean?

MR. LEVINSON: Well, if you don't adhere I'd like to have evidence in the record as to why the Court should have adhered to the 64 day requirement, that no independent or new political party petition should be accepted after 64 days prior to a general election.

MR. COLMAN: This is a special election.

MR. LEVINSON: You can call it anything you want. It is an election and it was scheduled—

MR. LEVIN: Judge, I agree with Mr. Levinson and I don't—it is a conceptual thing but in terms of the reasons you gave I am not necessarily in agreement with your opinion—I agree with Mr. Levinson, however, and to resolve the thing for a certainty and to be fair—I tried to be fair to both sides—and although it is putting us in a risk timewise, I made that commitment, [40] and they made certain—Mr. Colman had his clients give up certain things, certain commitments, and I—I would rather, and this is going against Mr. Levinson who is, in a certain sense, friendly, and I really have a hard time doing that, but my point is that I really think, Judge, that for this special election, right or wrong, we have made up our minds, and I have talked to my client and we just feel—

THE COURT: Well, I am going to—

MR. LEVIN: We should have the order and both sides should know what we are doing.

THE COURT: Well, I am going to adhere to it so far as this special election is concerned and—

MR. LEVIN: I might even join in with him on some of them, you know, the stare decisis effect, the Jackson case as to the general—

THE COURT: Well, the motion to vacate—yes. And the motion to vacate will be under advisement and, in other words, the permanent effect of my injunction, that question will stay unresolved until some such time that we can set it down, but there is no urgency. We will take care of that before the next time any problems like this may come up under the general election. So, you have my—

MR. LEVIN: Right. Judge, could I, since I have [41] not joined, may it be left open that sometime in the future I may have the opportunity, if I choose to, to join on that question?

THE COURT: I am not going to preclude you.

MR. LEVIN: All right. Fine.

THE COURT: Yes. I am not going to preclude you because of your position here.

MR. LEVIN: Fine. Thank you.

THE COURT: You are not going to be estopped.

MR. LEVIN: Right. I may do that.

THE COURT: All right.

MR. COLMAN: May I ask, your Honor, that in the event that you decide that there is any merit to this motion to vacate—

THE COURT: I will ask you to file a responsive brief.

MR. COLMAN: Please, because I personally think, with all due respect to Mr. Levinson, that their contentions raised in there—that the contentions raised in there as to the Jackson vs. Ogilvie point are frivolous.

THE COURT: Well, I will certainly let you—he has field a brief, do you want to file a responsive brief now?

MR. COLMAN: I think that your Honor's opinion [42] states—

THE COURT: Well, I thought that it did, too.

MR. COLMAN: Just what I would say.

THE COURT: All right. Well, I will let him present what he suggests as an offer of proof and if I think that we can derive some benefit from that I will set down for a hearing.

MR. COLMAN: So his offer will be in writing?

THE COURT: That is right. And copies to you.

MR. COLMAN: Fine.

MR. LEVIN: In the meantime we will enter the order?

THE COURT: I will enter the order.

MR. LEVIN: Which will finalize the special election?

THE COURT: That is right. All right.

MR. LEVIN: Thank you, Judge.

MR. COLMAN: Thank you, your Honor.

THE COURT: Yes.

IN THE [43]

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOCIALIST WORKERS PARTY, et al., *Plaintiffs,* vs. CHICAGO BOARD OF ELECTION COMMISSIONERS, et al., *Defendants.*	No 77 C 255 and No. 77 C 326
GERALD ROSE, et al., *Plaintiffs,* vs. JOHN HANLY, et al., *Defendants.*	—

CERTIFICATE

I DO HEREBY CERTIFY that the above-entitled proceedings were had before the HON. BERNARD M. DECKER, one of the Judges of said Court, in his courtroom, at the United States Court House, Chicago, Illinois, on February 11, 1977 and May 17, 1977, and that I as Official Court Reporter did stenographically write and transcribe the foregoing proceedings consisting of pages 1 through 42, inclusive, and that said transcription is a full and complete, true and accurate transcription of my official shorthand notes so made as aforesaid.

/s/ ROBERT J. BETZ
Official Court Reporter
United States District Court.

Supreme Court, U. S.
FILED
MAR 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellees.

Consolidated with

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, ET AL.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, ET AL.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

THOMAS AQUINAS FORAN
FORAN, WISS AND SCHULTZ
30 North LaSalle Street
Suite 3010
Chicago, Illinois 60602
Telephone: 368-8330
Attorney for Chicago Board of Election Commissioners

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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ON APPEAL FROM THE UNITED STATES COURT
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MOTION TO AFFIRM

INTRODUCTION

The Board of Election Commissioners of the City of Chicago (hereinafter called the "Board") was a defendant in these con-

solidated cases in the District Court. However, the Board did not appeal from the decision(s) of the District Court. This motion, therefore, is directed only to Argument II of the appellant's jurisdictional statement which relates to the conduct of the Board.

The Board, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the judgments of the United States Court of Appeals for the Seventh Circuit, and the District Court, be affirmed, as to the matters contained in appellant's Argument II, on the ground that the question is so insubstantial as not to warrant further argument.

ARGUMENT

Any Question of the Board's Authority to Agree to an Order "Solely as Applied" to the Special Election Concerned Is Moot.

In preface, what was involved here was not a General Election, whose time is fixed by statute, but the first known Special Mayoral Election in the City of Chicago's history (with a correspondingly very short time frame under statute). Thus, this was a rare, perhaps even *sui generis,* situation. At the District Court's behest, and with its conference participation, the Board agreed to an order *solely* for this special election, lowering the general statutory signature requirements from 25,000 to 20,000 signatures and extending the filing deadline by two weeks.

The State contends that the issue of the Board's action, is "still alive for future elections" and thus is not moot. (Appellant's Jurisdictional Statement, p. 13) The State is somewhat obtuse. It fails to appreciate that by the very terms of the order challenged, the order has no precedental value beyond the instant case and election. The order, recognizing the unique character of the instant case, is expressly limited solely to that single, special election. The order explicitly states that *"solely as applied* to the Special Mayoral Election to be held in Chicago on June 7, 1977" the statutory requirements will be as therein

stated. (See Board's App. 1) It was only on this non-precedental basis that the Board accepted this order. The issue, therefore, is clearly moot.

The cases cited by the State are irrelevant here. They all involved the validity of statutes which had continuing future effect. None of them concerned, as here, an order explicitly restricted to one election, and one election only. As the order here is restricted solely to just one election, the issue is not "capable of repetition, yet evading review." Or as the Court of Appeals for the Seventh Circuit here reasoned:

> "The order stated categorically that it applied only to the June 7, 1977 Special Mayoral Election which has long passed. Furthermore, this is not an issue which is 'capable of repetition, yet evading review.' *DeFunis* v. *Odegaard,* 416 U.S. 312, 318-19 (1974); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911). We have no reason to believe that a future agreement by an election board to reduce signature requirements and extend filing deadlines in a special election situation, albeit an unlikely occurrence, would evade review. For this reason we dismiss the appeal of the March 17, 1977 order. Costs will be assessed against the appellants." (Appellant's App., p. 6a)

Moreover, the State should not complain about lack of authority, as earlier in this very same cause, it agreed to an identical type order extending the filing deadline for Independant candidates to April 4, 1977, even though the statute called for a February 19, 1977 filing deadline. (Board's App. 2, attached hereto; Ill. Rev. Stat. 46, Par. 10-3)

The State's suggestion that the Board violated equal protection rights of other political parties is ludicrous. The State is the one that maintains that the signature requirements for new political parties in Local elections must remain at 25,000 35,000 or even 58,000. Meanwhile, the Chicago Board agreed to lower the signature requirement here to 20,000 equally for *all*

new political parties and Independent candidates, one Board policy reason for this being, as was stated to the District Court:

> "I think we have some responsibility as an Election Authority to be neutral and to help people get on the ballot rather than to be obstructive. . . ." (Transcript of Proceedings, 2/11/78, p. 8)

It is the State Board of Elections, not the Chicago Board, which has been completely insensitive to the problems of new political parties throughout these proceedings. The Board's agreement to an order to *lower* the signature requirements equally for all new parties from 25,000 to 20,000, *thus making it easier for all new parties to gain ballot access,* clearly does not constitute a violation of the equal protection clause.

The Chicago Board strenuously agrees that statutory signature and filing deadline statutes are mandatory and can't be administratively altered. The present issue, however, was not one of law as to a statute on its face. It relates, rather, to the factual application of the signature and time filing statute to this unique special election. The validity of this statute, as so applied, is by nature a *factual* issue.

The State's assertion that the Board altered the statutory requirements thus is not an accurate characterization of what transpired below. First, it requires stating that the United States District Court, not the Board, lowered the signature requirements and extended the time filing requirements. (App. 1) The Board agreed to this District Court order, after a conference with the Court's participation, under the following circumstances: three days earlier, on March 14, 1977, the District Court had issued a 27 page opinion. In that opinion, the Court *inter alia* had strongly implied that, after an evidentiary hearing, it would further lower the signature requirements for this election from the 25,000 signature maximum it had already lowered it to without any evidentiary hearing and it would extend the filing deadline to April 18, 1977 (the day preceding the Special Mayoral Primary). (See, e.g., Appellant's App., pp. 23a, 26a

[FN 16], 28a, 32a) Further, and critically, the final sentence of the District Court's opinion then mandated a pretrial conference on March 17, 1977 to schedule a hearing and "to possibly reach a *stipulated agreement* for the regulations pertaining to the instant Mayoral Election". (Emphasis added) (Appellant's App., p. 32a) Further, in their pleadings, the U. S. Labor Party was requesting that the signature requirements for this election be lowered to 6,545 and the Socialist Workers Party was requesting automatic ballot access. The Board thus was faced with the specter, among other things, of an unmanageable "laundry list" ballot and the administrative and other evils attendant thereto. (See, e.g., *Lubin* v. *Panish,* 415 U. S. 709, 715-719; *American Party of Texas* v. *White,* 415 U. S. 767, 781-782)

In this case climate, the agreed order for one, was a recognition of reality by the Board which, nonetheless, still protected for this Special Mayoral Election the legitimate State interest against a "laundry list" ballot; assured that only new party or Independent candidates demonstrating significant voter support would attain the ballot; fulfilled the Board's administrative need to finally set the election calendar and the identity of candidates sufficiently before the election to allow election preparation; and avoided a time-consuming, costly, and probably less successful evidentiary hearing.

CONCLUSION

The Board respectfully submits that the appellant's Argument II presents no substantial question for the decision of this Court, and that the judgments below as to the matters contained in Argument II be affirmed.

Respectfully submitted,

IAN H. LEVIN
FORAN, WISS AND SCHULTZ
30 North LaSalle Street
Suite 3010
Chicago, Illinois 60602
Telephone: 368-8330
Attorney for Chicago Board of Election Commissioners

APPENDIX

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants.
No. 77 C 326

ORDER

This matter coming on to be heard by the Court, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 20,000 signatures.

(B) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat. Ch. 46, Par. 10-3 to qualify for placement on the ballot as an independent candidate in the Special Mayoral Election shall be 20,000 signatures.

(C) That the last date for filing either as a new political party or an independent candidate in the Special Mayoral Election shall be April 18, 1977.

ENTER:
/s/ BERNARD M. DECKER
Judge

Dated:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

GERALD ROSE, et al.,
Plaintiffs,
vs.
JOHN H. HANLY, et al.,
Defendants.

No. 77 C 326

ORDER

The Chicago Board of Election Commissioners and the Illinois State Board of Elections having agreed, the Court hereby finds and orders that solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977 that:

(A) The number of signatures required to fulfill the five percent signature requirements of Ill. Rev. Stat., Ch. 46, Par. 10-2 to qualify for placement on the ballot as a new political party in the Special Mayoral Election shall be 35,947 signatures.

(B) That the last date for filing as an independent candidate in the Special Mayoral Election, pursuant to Ill. Rev. Stat., Ch. 46, Par. 10-3, shall be April 4, 1977.

(C) This Order is without prejudice to the parties contesting any of the remaining issues in the case.

ENTER:

/s/ BERNARD M. DECKER
Judge

Dated: February 11, 1977

Supreme Court, U. S.
FILED
APR 5 1978
MICHAEL RODAK, JR., CLE

No. 77-1248

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

Consolidated With

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al., *Plaintiffs-Appellees,*

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM IN PART AND DISMISS IN PART

WILLIAM H. LUKING
Suite 3100
One IBM Plaza
Chicago, Illinois 60611

JAYNE W. BARNARD
JEFFREY D. COLMAN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

LANCE HADDIX
33 North Dearborn Street
Room 815
Chicago, Illinois 60602

Attorneys for Appellees other than the Chicago Board of Election Commissioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

MOTION TO AFFIRM IN PART AND DISMISS IN PART

INTRODUCTION

Appellees Gerald Rose, United States Labor Party, et al., and the Socialist Workers Party, pursuant to Rule 16 of the Rules of this Court, submit this motion to affirm in part and to dismiss in part the appeal brought by appellant Illinois State Board of Elections. If the Court, in the alternative, views appellant's Jurisdictional Statement as a petition for a writ of certiorari, appellees respectfully request that the petition be denied.

QUESTIONS PRESENTED

1. Whether any substantial federal question is presented by appellant's attack on the unanimous decision of the Court of Appeals for the Seventh Circuit which declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a state statute which requires significantly larger numerical signature requirements for ballot access for independent or new political party candidates seeking *local* office than the maximum signature requirements permitted by statute for independent and new political party candidates seeking *statewide* office.

2. Whether a decision of the Court of Appeals which does not involve the unconstitutionality of a state statute under the United States Constitution is properly before this Court on direct appeal.

STATEMENT OF THE CASE

Following the death of the Honorable Richard J. Daley, Mayor of the City of Chicago, the Chicago City Council ordered that a Special Mayoral Election be held on June 7, 1977. The Chicago Board of Election Commissioners subsequently issued an election "calendar," granting "independent candidates" until February 19, 1977 to obtain and file the signatures of 35,947 qualified Chicago voters and

granting "new political parties" until April 4, 1977 to obtain and file the signatures of 63,373 voters, in order to secure positions on the ballot in the Special Mayoral Election. These figures purportedly were required by Ill. Rev. Stat., Ch. 46, §§10-2 and 10-3, which establish the minimum signature requirements for independent candidates and new party candidates in local elections as 5% of the entire vote cast in the last succeeding election for the same office being sought.*

Plaintiffs in the cases now consolidated before this Court included an independent candidate, two "new political parties" and their respective supporters. Their complaints challenged both the filing dates and numerical signature requirements imposed by the Chicago Board of Election Commissioners in its calendar. Plaintiffs' complaints alleged *inter alia* that Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3 unconstitutionally deprived plaintiffs of the equal protection of the laws because independent and new party candidates running for Mayor of Chicago in 1977 were required to obtain 35,947 or 63,373 signatures, while similarly situated candidates for statewide offices only needed 25,000 signatures. Because the complaints attacked the constitutionality of a state statute, the State Board of Elections intervened as a party defendant.

On February 8, 1977, plaintiffs moved for a preliminary and permanent injunction reducing the signature requirements and extending the filing deadlines for independent candidates and new political parties. While this motion was pending, the Chicago Board of Election Commissioners and the State Board of Elections unilaterally announced that the filing deadline for independent candidates would be extended and that the signature requirement for new

---

* The relevant portions of sections 10-2 and 10-3 are set forth in appellant's Jurisdictional Statement at pages 4-5.

political parties would be reduced. Thus, the filing deadline and signature requirements for independent candidates and new party candidates running in the Special Mayoral Election would be the same: April 4, 1977 and 35,947 signatures. This agreement by defendants was reflected in an order of the district court which was entered on February 14, 1977. This order was not objected to, and is not at issue in this appeal.

On March 14, 1977, the district court entered a preliminary and permanent injunction against the enforcement of those portions of Ill. Rev. Stat., Ch. 46, §§10-2 and 10-3 which would require more than 25,000 signatures to be filed by independent candidates and candidates of new political parties in order to secure access to the ballot for the Special Mayoral Election. (App., p. 32.)* The injunction also prohibited the defendants from requiring independent candidates or new political parties to obtain more than 25,000 signatures in subsequent local elections. The court's ruling was based on the fact that Sections 10-2 and 10-3, which establish the 5% formula for local elections, also provide that an independent candidate or new political party seeking ballot access in a *statewide* election must secure only 25,000 signatures.** The court, in an extensive memorandum opinion, found that the disparity in treatment afforded similarly situated persons by the statute was totally unjustifiable and violative of the Equal Protection Clause of the Fourteenth Amendment. (App., pp. 17a-26a.)

Several days later, on March 17, 1977, the court ordered that "solely as applied to the Special Mayoral Election to

*References to "App." are to the appendices attached to appellant's Jurisdictional Statement.

** The populations of the various cities and counties in Illinois are such that the "5%" rule will require more than 25,000 signatures only for elections in the City of Chicago or in Cook County.

be held in Chicago on June 7, 1977," the signature requirement for independent candidates and new political parties would be further reduced to 20,000 signatures and the filing deadline would be extended from April 4 to April 18, 1977. The court's order was pursuant to a stipulation entered into by the plaintiffs and the principal defendant, the Chicago Board of Election Commissioners. The settlement resolved all remaining disputes relating to the Special Mayoral Election and, by its own terms, had no bearing on any future elections.

On December 9, 1977, the Court of Appeals for the Seventh Circuit adopted the reasoning of the district court's memorandum opinion and affirmed the March 14 permanent injunction. The Court of Appeals dismissed the State Board of Elections' appeal from the March 17 order as moot.

I.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL BECAUSE THE COURT OF APPEALS' DECISION IN NO WAY CONTRAVENED THIS COURT'S SUMMARY AFFIRMANCE IN JACKSON v. OGILVIE AND MERELY REFLECTED FUNDAMENTAL PRINCIPLES OF EQUAL PROTECTION.

Appellant is soliciting this Court's attention by characterizing the opinion below as contrary to the ruling in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill.) (three judge court), *summarily affirmed,* 403 U.S. 925 (1971).

In the *Jackson* case, the plaintiff, who sought ballot access as an independent candidate in a regularly scheduled Chicago mayoral race, alleged that the application of the 5% signature requirement for an independent candidate *as compared to the substantially lower (.5%) signature requirement for Republicans and Democrats seeking nomination to the same office* created a denial of equal protection. The three-judge court disagreed.

In the instant case, plaintiffs argued and demonstrated that the application of the 5% signature requirement for independent candidates and new political parties seeking ballot access in a specially called local election *as compared to a maximum signature requirement of 25,000 for independent and new political party candidates seeking positions on the general election ballot in statewide elections* created a denial of equal protection. The court agreed. (App., p. 26a.)

Plaintiffs in no way challenged the ruling of the court in *Jackson.* Rather, plaintiffs presented a constitutional

attack on the statute that had not been raised or decided by the court in *Jackson.*

Even assuming this Court can accept appellant's proposition that "law of the case" applies in cases filed six years apart with entirely different plaintiffs and defendants, appellant concedes that "law of the case" applies only "to the same issues in subsequent proceedings in the case." (Jurisdictional Statement, page 11.) It is apparent that the issues considered by the court in *Jackson* v. *Ogilvie* were not present or presented in this case. In the case at bar, the district court properly recognized that (App., pp. 35a-36a):

> "Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was not considered by the *Jackson* court.[4]
>
> [4] This argument was mentioned in passing in a brief by the defendants [sic] but was ignored in both the majority and dissenting opinion in *Jackson.*"

The district court therefore properly concluded that "the decision of *Jackson* v. *Ogilvie* was not binding upon the court in this action, since the plaintiffs raised new factual and legal issues." (App., p. 37a.)

As to the application of the doctrine of *stare decisis,* this Court recently noted in *Mandel* v. *Bradley,* 432 U.S. 173, 176 (1977), that its summary affirmances of lower court decisions have limited precedential value:

> "Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.
>
> 'When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated

summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.' (Footnote omitted.) *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (BURGER, C. J., concurring).

"Summary affirmances and dismissals for want of a substantial federal question without doubt reject the *specific challenges presented* in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the *precise issues presented* and necessarily decided by those actions." (emphasis added.)

The district court and the Court of Appeals were not bound by any "law of the case" and in every respect properly applied the principle of *stare decisis* to reach a manifestly correct decision based on fundamental principles of equal protection. No conflict with this Court or other circuits was present. In fact, the court's opinion was in strict conformity with, and relied upon, *Lendall* v. *Jernigan* ("Lendall III"), 424 F. Supp. 951 (W.D. Ark. 1977), in which the district court struck down a statutory scheme which required a state senatorial candidate to file more signatures for ballot access in a district of small population than he would have had to file had he been running for municipal office elected by residents of the entire City of Little Rock. On facts substantially the same as those presented here, this Court summarily affirmed the decision that such a statutory scheme was unconstitutional. 433 U.S. 901 (1977).

The district court's order in this case properly applied fundamental principles of equal protection analysis. There is no rational reason, let alone a compelling state interest, for requiring similarly situated citizens to obtain 65,000

signatures to get on the ballot in a local election where only 25,000 signatures are required for candidates for United States Senator or for Governor or for other offices elected by all voters in the State of Illinois.

Therefore, no substantial federal question remains, and no further argument need be heard. This portion of the appeal should be summarily affirmed.

II.

THE QUESTION OF MOOTNESS IS NOT WITHIN THE JURISDICTION OF THIS COURT ON APPEAL, AND THEREFORE THAT PORTION OF APPELLANT'S APPEAL SHOULD BE DISMISSED.

Appellant attacks the Court of Appeals' decision dismissing on mootness grounds the appellant's claim that the Chicago Board of Election Commissioners was not authorized to agree to a court order establishing signature requirements and a filing deadline other than those set forth in the statutes, "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977." (App., p. 39a.) Appellant claims this issue should not have been considered moot and herein purports to appeal from that portion of the Court of Appeals' decision.

However, this Court's jurisdiction on appeal is limited to those cases in which "a party (relies) on a state statute held by a Court of Appeals to be invalid as repugnant to the Constitution, Treaties or Laws of the United States . . . and the review on appeal shall be restricted to the federal question presented." 28 U.S.C. Sec. 1254. See *United States* v. *Hastings*, 296 U.S. 188, 193 (1935).

The mootness ruling rendered by the Court of Appeals does not involve the constitutional validity of a state statute. Consequently, the issue may not be heard by this

Court on appeal. Presumably, the question could have been raised by a petition for writ of certiorari, and in fact appellant characterizes its Jurisdictional Statement in the alternative "as a writ of certiorari pursuant to 28 U.S.C. Sec. 2103 [sic]." (Jurisdictional Statement, p. 3.) However, appellant has not met the requirements of Rule 23 of the Rules of this Court for a petition for a writ of certiorari.

More significantly, regardless of the procedural manner in which this issue is viewed, the Court of Appeals correctly determined that the issue was moot. The district court's order of March 17, 1977, related exclusively to the filing deadline and signature requirement for the June, 1977 Special Mayoral Election necessitated by the death of Mayor Daley. The facts surrounding the Special Election were peculiar to this case. The likelihood that a similar situation will arise in the future is, at best, slight. Nothing in appellant's Jurisdictional Statement warrants this Court's exercise of its certiorari jurisdiction.

For the reasons noted above, appellant's appeal on the mootness ruling by the Seventh Circuit should be dismissed. In the alternative, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The unanimous decision of the Court of Appeals for the Seventh Circuit, adopting in full the extensive and well-reasoned decision of the district court, was manifestly correct. These decisions were based on (App., pp. 36a-37a):

> ". . . the undisputed points that the defendants had established the signature requirement of 35,947 for the special mayoral election, and that the Illinois election laws require no more than 25,000 signatures for ballot placement in statewide offices. The court ruled that as a matter of law plaintiffs' claims were to be evaluated under the 'strict scrutiny' standard of constitutional review, and that the state had to choose the 'least restrictive alternative' in setting petition requirements designed to further its legitimate purposes. The court could not find any rational reason why a petition with identical signatures could satisfy these state interests in statewide elections, and yet fail to do the same in a lesser political unit, opinion at page 20. The defendant Chicago Board did not advance any rational reason for this greater burden on less-than-statewide candidates, nor are any advanced by the defendant State Board."

This case was a simple one, was correctly decided and should receive no further review by this Court.

Respectfully submitted,

WILLIAM H. LUKING
Suite 3100
One IBM Plaza
Chicago, Illinois 60611

JAYNE W. BARNARD
JEFFREY D. COLMAN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

LANCE HADDIX
33 North Dearborn Street
Room 815
Chicago, Illinois 60602

Attorneys for Appellees other than the Chicago Board of Election Commissioners

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

——Consolidated With——

THE ILLINOIS STATE BOARD OF ELECTIONS,
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vs.

GERALD ROSE, et al.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF APPELLANTS

MICHAEL E. LAVELLE,
100 North LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 North LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 North LaSalle Street,
Chicago, Illinois 60602

Attorneys for Appellant,
Illinois State Board of Elections.

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IN THE

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OCTOBER TERM 1977

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Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF APPELLANTS

DECISIONS AND OPINIONS BELOW

The opinion and order of the U.S. Court of Appeals for the 7th Circuit was rendered on December 9, 1977. It is printed as Appendix A to Appellant's Jurisdictional Statement.

The opinions of the District Court, rendered on March 14, 1977 and April 6, 1977, are printed as Appendices B and C to appellant's Jurisdictional Statement.

The order of the District Court reflecting the agreement between appellees, Chicago Board of Election Commissioners and appellee U.S. Labor Party, signed on March 17, 1977, is printed as Appendix D to appellant's Jurisdictional Statement.

JURISDICTION

This Court noted probable jurisdiction on April 24, 1978, pursuant to U.S.C. 1254(2), in this cause from the final decision of the Circuit Court of Appeals for the Seventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State reprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 5 Of The Constitution Of The State Of Illinois, 1970

"Section 5. Board of Elections

A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State."

STATUTES INVOLVED

The State statutes involved in his appeal are 46 Ill. Rev. Stat., §§ 10-2, 10-3 and 1A-8(11). Section 1A-8(11) sets forth the supervisory authority of appellant in the administration of elections throughout Illinois. Sections 10-2 and 10-3 set forth a 5% minimum signature requirement for nomination papers for new political parties and independent candidates.

Section 10-2 provides, in part:

. . . Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. . . . if such new political party shall be formed for the entire State [the petition] shall be signed by not less than 25,000 qualified voters. . . . If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such preceding general election in such district or political

subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area . . .

Section 10-3 provides in part:

> Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; . . . Nominations for independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political divison, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area. . . .
>
> § 1A-8. The State Board of Elections shall exercise the following powers and perform the following duties in addition to any powers or duties otherwise provided by law.

Section 1A-8(11) provides:

> (11) Supervise the administration of the registration and election laws throughout the State.

QUESTIONS PRESENTED

Whether the Court of Appeals can negate a state statute recently held constitutional by this Court in *Jackson* v. *Ogilvie*?

Whether the Court of Appeals can ignore the principle of law mandated by this Court in *Moore* v. *Ogilvie*, that the passage of an election does not render moot substantial questions still alive for all future elections?

STATEMENT OF THE CASE

A. *History of the Proceedings*[1]

On December 20, 1976, the office of Mayor of the City of Chicago became vacant due to the death of the incumbent mayor, Richard J. Daley. This event put on notice all interested parties that a special election would be called to fill such vacancy within six months of the declaration of the vacancy by the City Council. Ch. 24, Ill. Rev. Stat., § 3-4-6.

On January 13, 1977, acting pursuant to § 3-4-6, the City Council set June 7, 1977 as the date of the special mayoral election.

On or about January 18, 1977, the Chicago Board of Election Commissioners (hereinafter "Chicago Board"), printed an Election Calendar for this election.[2]

On January 24, 1977 and January 31, 1977, Appellees commenced two separate actions in the United States District Court for the Northern District of Illinois to declare as unconstitutional those provisions of § § 10-2 and 10-3 of

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1. Citations to the Appendix of the Jurisdiction Statements will be hereinafter referred to as "J.A." Citations to the Appendix to this appeal will be hereinafter referred to as "App."

2. No longer an issue in this appeal are the allegations that the 1977 election calendar, published by the Chicago Board, was incorrect by listing different filing dates for independent candidates and new political party candidates, and by setting a higher minimum signature requirement for new political party candidates than for independent candidates. The appellant intervened and stipulated that Illinois law mandated equal filing dates and the same signature requirements for independent candidates as well as for new political party candidates.

the Illinois Election Code regarding the nominating petition minimum signature requirement for independent candidates and candidates of new political parties.

In *Socialist Workers Party, et al.* v. *Chicago Board of Election Commissioners, et al.*, No. 77 C 255, the Socialist Workers Party and two voters supporting candidates of the Socialist Workers Party sued the Chicago Board and its members, the City Clerk of Chicago, and members and employees of the appellant.

In *Gerald Rose, et al.* v. *John Hauly, et al.*, No. 77 C 326, the United States Labor Party, a candidate of the United States Labor Party, and two voters supporting the candidates of the United States Labor Party, sued the Chicago Board. At the request of the Chicago Board, the appellant, State Board of Elections intervened in this action.

B. *The Challenged Statutes*

The pertinent provisions of Chapter 46, Ill. Rev. Stat., §§ 10-2 and 10-3, require that nominating petitions for new political party candidates and independent candidates be signed by qualified voters equaling not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision voting as a unit for the election of officers to serve its respective territorial area.

Sections 10-2 and 10-3 further provide that where the 5% signature requirement is applied to new political party candidates and independent candidates running for statewide offices, such petitions shall be signed by not less than 25,000 qualified voters. Appellees argued that the application of the 5% signature requirement to independent and new political party candidates running for mayor of the City of Chicago in 1977, required them to obtain 35,947 signatures, while independent and new political party candidates for statewide offices only need 25,000 signatures. Consequently, §§ 10-2 and 10-3 allegedly deprived appellees of equal protection of the law.[3]

C. *Proceedings In The District Court*

Without an evidentiary hearing, on March 14, 1977, the District Court, in a consolidated opinion, held that a minimum signature requirement in excess of 25,000 signatures ". . . cannot be the least drastic means of accomplishing the state's goals and must be found to unduly impinge the constitutional rights of independents, new political parties and their adherents." (J.A.B., p. 26a) The trial court, in the same opinion, issued a permanent injunction against the Chicago Board requiring that the Chicago Board accept nominating petitions for candidates for offices serving less than the entire state containing a minimum of 25,000 signatures.

On March 17, 1977, the District Court signed an agreed order reflecting an agreement between the defendant-appellee, U.S. Labor Party and the Chicago Board, to reduce the signatures for independent and new political party candidates below the 5% minimum of 39,937 (25,000 by virture of the district court's March 14th order), to a new minimum of 20,000 signatures, and to extend the filing deadline from sixty-four days before the election (April 4,

---

3. The appellees also challenged as unconstitutional, the statutory filing deadline for independent candidates and candidates of a new political party. The Trial Court did not rule on this question pending ". . . evidence adduced as to urgency and possible compelling state reason for setting the filing deadline. . . ." (J.A.B., p. 31a). However, since an agreed order between appellees extended the filing period beyond the statutory period, notwithstanding the objections of appellant, this issue was never adjudicated.

1977) to fifty days before the election (April 18, 1977). (J.A.D., p. 30a) Appellant was not advised of this agreed order and first learned of it at this hearing. Appellant vigorously objected at its entry.

On March 17, 1977, the appellant moved to vacate the March 14th order of permanent injunction on the grounds that it was issued without an evidentiary hearing. Appellant further argued that the decision in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), was binding on the District Court in that the U.S. Supreme Court specifically upheld the constitutionality of both the 5% minimum signature requirement in Illinois for independent and new political party candidates as well as the petition filing deadline of sixty-four days prior to election day.

On April 4, 1977, the appellant filed an Offer of Proof and another motion to vacate the order of permanent injunction set forth in the March 17th order, maintaining that it was incumbent upon the appellees, at the very least, to offer evidence that they could neither meet the 35,947 minimum signature requirement nor file their petitions by the statutory deadline. Appellants additionally attacked the March 17th order, asserting that the Chicago Board lacked authority to agree to an order to lower the minimum signature requirements or to extend the filing deadline on behalf of a particular political party contrary to state law.

On April 6, 1977, the District Court denied the motions of the State Board to vacate the orders entered on March 14, 1977 and March 17, 1977.

D. *Decision of the Court of Appeals*

On December 9, 1977, the Court of Appeals affirmed the March 14th permanent injunction and adopted the March 14, 1977 memorandum opinion of the District Court. On

the question of the issuance of a permanent injunction without an evidentiary hearing in violation of Fed. R. Civ. P. 65, the Court of Appeals dismissed the argument by stating, in part: "No purpose will have been served by holding an evidentiary hearing in this case. There were no actual disputes as to the grounds on which the injunction was ordered." (J.A.D. p. 4a)

On the question of the authority of a local election agency to reduce the signature requirement below the minimum set by the trial court and extend the filing deadline for one political party (and not for another political party because it did not meet the new standard agreed to between the local agency and the first political party), the Court of Appeals held this to be moot. The Court reasoned, in part, that the order applied only to the special mayoral election, which was over, and the issue, if repeated, could be reviewed at a later time by the Courts. (J.A.A., p. 6a)

I.

THE UNITED STATES COURT OF APPEALS IS REQUIRED TO FOLLOW THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *JACKSON* v. *OGILVIE*

A. The application of the doctrines of *law of the case* and *stare decisis*.

In *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S. Ct. 2247 (1971), which summarily affirmed a three-judge district court opinion, 325 F. Supp. 864 (N.D. Ill., 1971), this Court upheld the constitutionality of the statutes at issue in this litigation. Yet, the Court of Appeals wholly failed to examine the District Court's opinion in light of *Jackson* v. *Ogilvie, supra*, and the arguments of the appellant that the *Jackson* case was dispositive of all constitutional issues. Adopting the March 14, 1977 opinion of the District Court, the Court of Appeals uncritically deferred to the " . . . well-reasoned equal protection analysis" of the District Court. In so doing, the Court of Appeals ignored the decision of this Honorable Court in the *Jackson* case.

In upholding the constitutionality of the Illinois 5% signature requirement for independent candidates seeking the office of mayor of the City of Chicago, the three-judge *Jackson* court said, at page 868:

> "Jackson argues that the 5% minimum requirement of § 10-3 of the Illinois Election Code operates to limit his and plaintiffs Wilkinson's and Maclin's first amendment rights. He asserts that before they can act to advance his candidacy they must be joined by a group numbering approximately 58,000 qualified electors of the city. The question more pointedly is, can the state limit the availability of the ballot to

> only those candidates who evidence the support of 5% of the electorate? We think it can. In *Briscoe* v. *Kusper*, 435 F. 2d 1046 (7th Cir. 1970), the Court noted:
>
> > 'A state clearly has a substantial interest in administering its own local elections. This state concern reasonably includes regulation of candidates, and it may well call for limitations on access to ballots by those seeking public office. Such limitations may be justified by the need to prevent subversion or corruption.'
>
> "While the 5% requirement is higher than the percentage required in a majority of other states (see, *Williams* v. *Rhodes, supra*, 393 U.S. 22 n. 9. 89 S. Ct. 5) nonetheless, we feel it is a reasonable limitation that serves a compelling interest.'

Under the doctrines of *stare decisis* and *law of the case*, the Court of Appeals was bound to follow the dictates of this Honorable Court.

The general doctrine of *stare decisis* is such that a court is not inexorably bound by its own precedents, but in the interest of uniformity of treatment of litigants, and of stability and certainty in the law, the court will follow the rule of law which has been established in earlier cases, unless clearly convinced that the legal rule was originally erroneous, or is no longer sound because of changed conditions, and that more good than harm would come by departing from precedent. See Moore, *Federal Practice* § 0.404[1], p. 401. Accord: *Helvering* v. *Griffith*, 318 U.S. 371 (1942); *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Wharton* v. *Hirsch*, 348 F. 2d 906 (1965).

The doctrine of *law of the case*, on the other hand, not only establishes a precedent for subsequent cases under the doctrine of *stare decisis*, but it establishes the law which other courts owing obedience to it must normally apply to the same issues in subsequent proceedings in that

case. See, Moore, *Federal Practice*, §0.404[1], p. 403. This doctrine is ordinarily invoked only where the case is the same. Appellant submits, however, that the doctrine should also be invoked where there is a substantial identity of *interests* of the parties in later cases; where there are no new evidentiary facts adduced; and, where the same relief is sought based upon the same issues. Under such circumstances the plaintiffs in the later case are "standing in the shoes" of the plaintiffs in the earlier case.

Res judicata is not applicable here since this doctrine operates after a question goes to judgment and is intended to prevent relitigation by making a decision binding upon the individual parties to a suit and is a limitation upon the court which is applicable in all cases where the parties and legal issues are the same. See, Moore's *Federal Practice*, § 0.404[1], at 404-405).

The doctrines of *stare decisis, law of the case* and *res judicata* have had many overlapping variations in application by the courts, blurring the distinctions between them. The following excerpt, however, succinctly states the relationships between these doctrines:

> "The doctrine called "law of the case' lies halfway between *stare decisis* and *res judicata*. It is stronger than *stare decisis*, for while *stare decisis* bids the courts follow the precedents after considering them . . ., the *law of the case* dispenses with the need of considering again what has been previously decided in the same suit." See *Lummus*, the "Law of the Case" in Massachusetts (1929) 9 Boston U.L. Rev. 225.

The Court of Appeals relied, in part, upon a distinction between special and general elections to uphold the issuance

of the permanent injunction.[4] The Court of Appeals did not acknowledge that: (1) the plaintiff-appellees had an identity of interests with the *Jackson* plaintiffs; (2) the same major defendant was involved; (3) the issues were the same; and, (4) no new facts were adduced. Yet, the injunction applies without distinction, in clear contradiction of the determination made by this Court in *Jackson*. The decision in the *Jackson* case was in fact dispositive of the issues raised in the instant case, and the Court of Appeals was bound to follow this Court's determination of those issues.

A summary affirmance by the Supreme Court is binding upon a United States District Court decision in a like matter, provided the issues litigated and decided are substantially the same. *Silverman* v. *Browning*, 414 F. Supp. 80 (D.C. Conn. 1976), *aff'd* 429 U.S. 876, 97 S. Ct. 228. See also, *North Carolina* v. *Duke Power Co.*, 425 F. Supp. 411 (D.C. N.C. 1976).

In *Antonioli* v. *Lehigh Coal and Navigation Co.*, 451 F. 2nd 1171 (3rd Cir. 1971) the elements required for invocation of the doctrine of *stare decisis* were shown to be in-

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4. Yet, plaintiff-appellees were never required to prove their allegation that the application of the Illinois law in the context of a special mayoral election was unconstitutional. No evidentiary hearing was ever held to determine the factual questions involved. Without determining at any stage of the proceedings that the instant case involved any significant factual differences from *Jackson*, the District Court issued a permanent injunction, applicable not only to the particular special mayoral election, but to all future elections. The Chicago Board is now permanently enjoined from requiring more than 25,000 signatures for candidates for offices serving less than the entire state.

tegral parts of the doctrine of the *law of the case*. In addition, it was held that if *res judicata* did not apply, the doctrine of *law of the case* did apply because, although the plaintiffs were different in the second case, there was an identity of interests of the plaintiffs against the same defendant since the same ultimate relief was sought based upon the same ultimate issues.

The *Antionoli* case then extended the doctrine of the *law of the case* to a second lawsuit holding, in effect, that such facts give rise to a mandatorily binding precedent as opposed to the persuasively binding precedent of *stare decisis*.

The major defendant in *Jackson*, as here, was the Chicago Board. This case and the *Jackson* case both involve a challenge to the Illinois Election Code's minimum signature requirements of 5% based upon the Equal Protection of the Laws Clause of the United States Constitution. The signature requirements in both cases exceeded 25,000. Both plaintiffs sought the same relief: a preliminary and permanent injunction against enforcement of the Illinois 5% signature requirements. Both sets of plaintiffs sought to be placed upon the ballot as candidates for mayor of the City of Chicago. Thus, the only distinctions between the *Jackson* case and the case presented by this appeal are distinctions in form, not substance: the actual name of the candidates seeking to be placed on the ballot and the designation of the election as a "General Election (or as a) Special General" election. Thus, the alleged distinctions are of no legal significance.

The district court attempted to distinguish the *Jackson* case from this appeal, writing:

> The court has great respect for the principle of *stare decisis* but is not bound by previous cases where different facts are alleged and where new and persuasive arguments are raised. (J.A.C. p. 362)

But that Court did not cite any different facts nor could it do so since no evidentiary hearing was held. Nor were any new arguments raised for it to rely on. It has been said that such a failure to follow an existing precedent reflects "the straining of the Court to find the evidence was different." *Union Light, Heat and Power Co.* v. *Blackwell's Administrator*, 291 S.W. 2d 539, 87 ALR 2d 264 (1956).

A special mayoral election is not different from a regularly scheduled mayoral election except that a candidate is elected to less than a full term. All viable parties and candidates had an equal statutory time period in which to gather and file the 5% minimum signatures. And, most important, the permanent injunction reducing the signature requirement was issued for *all elections*—not just for the June 7, 1977 special mayoral election in Chicago.

The distinctions in Illinois law between signature requirements for statewide and local independent candidates and new political party candidates were indeed presented to the U.S. Supreme Court in the *Jackson* case by the Attorney General of Illinois, in his argument against the constitutionality of §§ 10-2 and 10-3 of the Election Code. (See, in the Court's record, Defendant's Reply to Plaintiff's Memorandum In Opposition to Defendant's Motion to Dismiss, filed in the District Court on February 22, 1977). Appellant submits that there were no new persuasive arguments raised in the instant case that were not raised in *Jackson*.

The Court of Appeals herein erred in ignoring the *Jackson* Court determination of the issues before it. The holding in *Jackson* was there summarized as follows:

> "Thus, the court determines that the challenges to §§ 10-3, 10-4 and 10-6 of the Illinois Election Code, 46, Ill. Rev. Stat., §§ 10-3, 10-4 and 10-6 are without merit.

> The plaintiffs' motion for preliminary and permanent injunctive relief are denied and the cause is dismissed." 325 F. Supp., at 869.

The Court of Appeals decision was in direct contradiction of the precedent established by this Court, which the lower court was bound to follow. The judgment of the Court of Appeals should therefore be reversed, for under the facts and circumstances attendant to these proceedings, the Court of Appeals was required to follow and apply the principles of law set forth in *Jackson* under *law of the case* and *stare decises*.

B. The *Jackson* decision is not an anomaly.

The rationale of *Jackson* is supported by numerous other decisions of this Court. In *Oregon* v. *Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970), it was stated:

> In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout history. 400 U.S., at 125-26.

Jenness v. *Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971)[5], upheld a Georgia statute requiring that candidates for elective office, not winning a political party primary, must obtain nominating signatures equal to 5% of the number of *registered* voters[6] at the last general election for that office;

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5. The District Court opinion in *Jackson* was affirmed by this Court on June 21, 1971, the same day this Court issued its opinion in *Jenness*.

6. *Jackson* upheld a requirement for signatures equal to 5% of the votes cast at the last general election, not 5% of all registered voters. Thus, the Illinois requirement upheld in *Jackson* is actually less restrictive than those upheld in *Jenness*. A percentage of those eligible to vote within a unit

American Party of Texas v. *White*, 415 U.S. 767, 94 S. Ct. 1296 (1974), upheld a Texas statute distinguishing between unfavorable nominating procedures for small political parties as opposed to favorable procedures for large political parties on the basis of voter support at the last election; *Rosario* v. *Rockefeller*, 410 U.S. 752, 93 S. Ct. 1245 (1973), upheld a New York statute requiring a person to enroll in a political party at least 30 days prior to a general election so as to be eligible to vote in the party primary the following year; *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224 (1973), upheld a California statute restricting the electorate of a water storage district to landowners; *Burns* v. *Fortson*, 410 U.S. 686, 93 S. Ct. 1209 (1973) (per curiam), upheld a Georgia statute cutting off voter registration 50 days before a general election; and, *Marston* v. *Lewis*, 410 U.S. 679, 93 S. Ct. 1211 (1973), (per curiam), upheld an Arizona statute imposing a 50-day durational voter residency requirement.

II.

SUBSTANTIAL LEGAL QUESTIONS CANNOT BE MOOTED BY THE PASSAGE OF AN ELECTION

The Chicago Board violated Illinois election law by reducing minimum signature requirements below an objective statutory standard for ballot access (20,000 signatures

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of government represents a far greater numerical requirement than the percentage of those actually voting. While the required number of signatures for the special mayoral election was 35,947 (5% of votes cast at the previous election), the comparable percentage drawn from the pool of all registered voters would have been over 80,000 (5% of the *1,605,865* voters registered in Chicago the time of the special mayoral election.)

instead of 25,000 signatures as mandated by the District Court) and by arbitrarily extending the statutory filing deadline from 64 days to 50 days before the election. Specifically, this action was undertaken for the benefit of the U.S. Labor Party, a new local political party. Such reduction was effectuated by an agreed order over the objection of appellant that Chicago Board lacked any discretion whatsoever to set a different standard for ballot access.[7] This action not only contradicted the supervisory authority of appellant (Ill. Const., Art. III § 5, Ch. 46, Ill. Rev. Stat., § 1A-8(11)), it also violated state law. It is clear that Illinois election authorities are required to follow mandatory provisions of election laws. See, e.g., *Weston* v. *Markgraf*, 160 N.E. 215, (1928); *Waters* v. *Heaton*, 4 N.E. 2d 41 (1936); *Bergeson* v. *Mullinix*, 78 N.E. 2d 297 (1948).

By its private agreement with the U.S. Labor Party, the Chicago Board also violated the equal protection rights of other political parties who were unable to meet the U.S. Labor Parties' minimum requirement of 20,000 signatures. Once having ignored the statutory standard—and the judicial standard of 25,000 signatures—the Chicago Board had no grant of authority to impose any standard for ballot access for other political parties and independent candidates seeking the office of Mayor. Nor did the Chicago Board have any grant of authority to extend the filing date beyond the period allowed for the filing of independent and new political party candidates.[8]

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7. A similar order was entered in the companion case, *Socialist Workers Party et al.* (App. p. 73).

8. On April 14, 1977, the Libertarian Party sought to intervene in the *Socialist Workers Party* suit; on April 15, 1977, the district court denied leave to intervene. Such intervention was an effort to obtain "tailoring" of the minimum signature requirement to 18,000 in order to suit their needs. (App. p. 5, Docket Sheet for Socialist Workers Party case).

Notwithstanding this flagrant violation of a statutory directive, the Court of Appeals held the issue to be moot since the election had passed. The Court of Appeals noted at footnote 2: "We in no way suggest that appellants have failed to raise a substantial legal question on the issue. However, in light of our conclusion that it is moot, we will have to postpone considerations of the merits for another day." (J.A.A., p. 6a).

The law is clear that passage of an election does not render moot an issue still alive for future elections. In *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969), the Illinois Electoral Board (predecessor agency to appellant) refused to certify the plaintiffs who were independent candidates for the office of electors of the President and Vice President of the United States in the 1968 election, on the ground that although the plaintiffs' nomination petitions contained 25,000 signatures, as required by an Illinois statute, the petitions did not meet the requirement of the same statute that they include the signatures of 200 qualified voters from each of at least 50 of the 102 counties within the state. Challenging the constitutionality of this statutory provision, the candidates appealed to this Court from an adverse judgment of the three-judge District Court. Refusing to dismiss the appeal as moot because the 1968 election had been already held, this Court pointed out that the questions raised by the statute would not be answered and would remain and control future elections as long as Illinois maintained her present system as she had done since 1935. The problem was, therefore, "capable of repetition, yet evading review," (394 U.S. at 816) and the need for a resolution of the problem reflects a continuing controversy in the federal-state area. Cf. *Storer* v. *Brown*, 415 U.S. at 737, fn. 8.

In *Brown* v. *Chotc*, 411 U.S. 452, 420, 93 S. Ct. 1732 (1973), this Court held that the conduct of a primary election during litigation did not render moot the question raised by persons seeking to become candidates in the election, whether state election code provisions violated the Federal Constitution by requiring primary candidates to pay a filing fee, thereby barring indigents from seeking elective office, and from voting for the candidates of their choice.

In *Storer* v. *Brown*, 415 U.S. 724, 94 S. Ct. 1274 (1974), *reh. den.* 417 U.S. 926, 94 S. Ct. 2635, the constitutionality of certain California election laws governing access to the ballot was challenged by several independent candidates. The challenge was instituted prior to the 1972 election, but the appeal was not taken until after the election was conducted. Although it was contended that the plaintiffs would now be precluded effective relief, this Court, retaining jurisdiction, rested its decision on the ground that the issues raised would persist if the state statutes were applied in the same manner in future elections. A Court's failure to resolve the controversy on appeal would permit the controversy to be "capable of repetition, yet evading review." *Storer* v. *Brown*, 415 U.S. at 737, fn. 8. Accordingly, this Court reviewed the operation and application of the California statute in order to simplify or preclude future challenges and afford any future plaintiffs the opportunity to file timely cases so that adjudication of similar issues could be had before the election is held.

A challenge to a state statute involving elections cannot be left unresolved by the courts. This Court has noted that the likelihood of repetition of the controversy and the public interest in assuring appellate review are the key elements which require that the issues be resolved. See, e.g.

Southern Pacific Terminal Co. v. *Interstate Comm.*, 219 U.S. 498, 31 S. Ct. 279 (1911). The *Southern Pacific Terminal* doctrine identifies an "exception" to the judicial bar of mootness where the litigation involves actions by or against public officials, and the public interest is served in the enforcement of the legislative will and constitutional mandates.

In the case at bar, an administrative agency arbitrarily, in violation of state law and the supervisory authority of appellant, used, as an arbitrary standard for access to the ballot, the wishes of one political party. Another political party, the Libertarian Political Party, unable to meet the 20,000 signature standard, was rejected by the Chicago Board in their efforts to lower the signature requirement so that they, too, could obtain access to the ballot.

Such favoritism strikes at the very heart of a democratic system, especially in so crucial an area as elections.

Since the agreed order stands as a precedent for local election authorities to arbitrarily alter Illinois law, this Court should not permit the resolution of such issue to be held for "another day."

CONCLUSION

In view of the foregoing, Appellant respectfully prays that the decision of the Seventh Circuit Court of Appeals be reversed.

Respectfully submitted,

MICHAEL E. LAVELLE,
100 North LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 North LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 North LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant,
Illinois State Board of Elections.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, et al.,
Plaintiffs-Appellees.

Consolidated With

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, et al., *Plaintiffs-Appellees,*

CHICAGO BOARD OF ELECTION COMMISSIONERS, et al.,
Defendant-Appellee.

On Appeal from the United States Court of Appeals for the Seventh Circuit

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM IN PART AND DISMISS IN PART

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,
Attorneys for Appellant
Illinois State Board of Elections.

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Chap. 46, Illinois Revised Statutes, (Election Code) § 10-2 .....

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ARGUMENT

The questions raised by this appeal are: 1) Whether the Court of Appeals can negate a state statute recently held constitutional by this Court in *Jackson* v. *Ogilvie*?; 2) whether a Court of Appeals can ignore the principle of law mandated by this Court in *Moore* v. *Ogilvie* that the passage of an election does not render moot substantial legal questions still alive for all future elections?

Illinois law requires independent candidates and candidates of new political parties, in order to secure ballot access, to obtain petition signatures of not less than 5% of the number of voters who voted at the last general election in the political subdivision. Appellants maintain that the issues in this cause have previously been decided by the U.S. Supreme Court in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd* 403 U.S. 925 (1971), and deserve the effect of the doctrines of *stare decisis* and "law of the case."

Appellees, *Socialist Workers Party, et al.* and *Gerald Rose, et al.,* attempt to persuade this Court to refrain from reviewing the case on the basis that the decision of *Jackson* v. *Ogilvie, supra,* is to be distinguished from the case at bar since "Plaintiffs [Appellees] present an attack on the statute that had not been raised or decided by the Court in *Jackson.*" (Motion To Affirm In Part And Dismiss In Part, p. 2) Nothing could be further from the truth.

As for the raising of the issues regarding the signature requirements for independent and new political party candidates seeking local office, as they relate to such candidates seeking statewide office, the Attorney General of the State of Illinois in *Jackson* v. *Ogilvie, supra,* specifically proffered this argument in the U.S. District Court. In his memorandum he argued:

> "It may also be remembered that it is even more difficult for an independent candidate to obtain signatures than it would be for an independent party. Yet, a whole new state political party need only 25,000 signatures throughout the entire state for state office (10-2), while a single independent candidate for only the office of Mayor of Chicago needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago." (Attorney General's Memorandum, p. 3)

Moreover the Attorney General's argument was also included in Plaintiff Jackson's Supreme Court Brief and Appendix.

With respect to the resolution of the issue on the constitutionality of the 5% minimum signature requirement for independent and new political party candidates, the *Jackson* Court states:

> "The question more pointedly is can the State limit the availability of the ballot to only those candidates who evidenced the support of 5% of the electorate? We think it can." (325 F. Supp., at 868).

Appellees would have this Court believe that the *Jackson* decision dealt solely with the equal protection issue in the narrow context of independent signature requirements, as they relate to the political party signature requirements. The *Jackson* opinion leaves no doubt that the equal

protection issue was decided on the grounds that the 5% figure satisfied a compelling state interest and not merely in relational terms as reconstructed by Appellees.[1]

In a further attempt to confuse the issues, Appellees refer to the case of *Lendall* v. *Jernigan*, 424 F. Supp. 951 (W.D. Ark., 1977), by arguing this case on all fours with the case below. They maintain that the District Court in Arkansas invalidated a 10% signature requirement for independent candidates because a state senatorial candidate was required to file more signatures from a less populated legislative district than were he a municipal candidate in a more populous area.

In *Lendall*, the Court invalidated the 10% requirement owing to the state's failure to present any evidence which would support the argument that the 10% requirement was necessary to vindicate any of the state's interests. Hence, *Lendall* cannot apply to the case at bar since the Illinois signature requirement of 5% is one-half of the 10% signature requirement in *Lendall*. Moreover, in the Court of Appeal's opinion below where is there any indication of reliance upon *Lendall* as suggested by Appellees?

On the issue of mootness, Appellees would have this Honorable Court, in effect, sanction judicial action directly violative of the established doctrines of this Court.

---

1. Appellees even go so far as to misrepresent the minimum signature requirement, 65,000, when 35,947 was stipulated by the parties as the correct 5% figure as applied to the mayoral election in question. (Motion To Affirm In Part And Dismiss In Part, pp. 8-9)

In fact, in *Jackson*, the 5% figure amounted to 58,000 signatures or 22,053 more signatures than required in the case below.

The courts below, while paying lip service to the judicial standard of *Moore* v. *Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 (1969), declined to review the issue of an election authority unilaterally favoring one political party by lowering signature requirements in violation of state law. To sustain the mootness argument in light of the facts below would set a precedent in the 7th Judicial Circuit that substantial legal questions can in fact be mooted by the passage of an election.

CONCLUSION

The District Court and the Court of Appeals were bound by the doctrines of "law of the case" and *stare decisis*. By decreeing that 25,000 signatures (further reduced to 20,000 signatures by agreement of the Appellees) would be the maximum number of signatures that may be required of independent and new political party candidates, the court below issued rulings in direct conflict with the mandate of this Honorable Court. For these and the foregoing reasons, probable jurisdiction should be noted to review the decision of the 7th Circuit Court of Appeals, rendered on December 9, 1977.

Respectfully submitted,

MICHAEL E. LAVELLE,
100 N. LaSalle Street,
Chicago, Illinois 60602,

MICHAEL L. LEVINSON,
100 N. LaSalle Street,
Chicago, Illinois 60602,

FRANKLIN J. LUNDING, JR.,
100 N. LaSalle Street,
Chicago, Illinois 60602,

Attorneys for Appellant
Illinois State Board of Elections.

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
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OCTOBER TERM, 1977

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

vs.

SOCIALIST WORKERS' PARTY, *Et Al.*,
Plaintiffs-Appellees.

Consolidated with

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, *Et Al.*,
Plantiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS,
Defendant-Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF OF APPELLEE — SOCIALIST WORKERS' PARTY, *ET AL.*

RONALD REOSTI
REOSTI & PAPAKHIAN
658 Pallister Avenue
Detroit, Michigan 48202

LANCE HADDIX
33 North Dearborn Street
Room 815
Chicago, Illinois 60602

Attorneys for Appellees other than the Chicago Board of Election Commissioners

AMERICAN BRIEF AND RECORD COMPANY, 1[illegible] WEALTHY STREET, S. E.
GRAND RAPIDS, MICHIGAN 49503 — [illegible]HONE 458-5326

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IN THE SUPREME COURT OF THE UNITED STATES

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Defendant-Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF APPELLEE — SOCIALIST WORKERS' PARTY, *ET AL.*

QUESTION PRESENTED

1. Is a state statute which requires a candidate for local office to demonstrate a greater quantum of support than a candidate for state-wide office unconstitutional?

SUMMARY OF ARGUMENT

I.

The Illinois Election Code, Chap. 46, §§10-2 and 10-3 require minor party and independent candidates to display, both absolutely and relatively, more support to run for office in Chicago and Cook County. This requirement is so irrational and arbitrary that it cannot be justified in view of its impact on important constitutional rights.

II.

The appellant has tried to block review of the constitutional challenge sustained below by invoking the doctrines of *stare decisis* and *law of the case.* Neither doctrine applies because the issues raised by appellees were not addressed or decided in *Jackson* v. *Ogilvie,* 403 U.S. 925 (1971) which appellants rely on.

ARGUMENT

I.

THE ADDED BURDEN ON LOCAL CANDIDATES IMPOSED BY ILLINOIS ELECTION LAW IS ARBITRARY, IRRATIONAL AND NOT REASONABLY RELATED TO A LEGITIMATE STATE INTEREST.

The Illinois Election Code, Ill. Rev. Stat. Ch. 46, §10-2 provides that "new" political parties can have their candidates for state-wide office placed on the general election ballot by filing petitions signed by not less than 25,000 qualified voters. Further that such parties can have their candidates for local office placed on the ballot by filing petitions signed by qualified voters equaling in number 5% of the vote from that locale in the preceding election.

The effect on this statute is to require Appellant to file 25,000 signatures if it wishes to run a candidate for state office, while requiring 35,000 signatures or more if it wishes to run a candidate in Chicago or Cook County.

Appellees contend that §10-2 as applied to elections in Chicago or Cook County constitutes an unconstitutional infringement of their First Amendment right of association and their right to vote and denies them equal protection of the law.

States have a legitimate interest in regulating the electoral process so as to insure the integrity of the electoral process, and thus may condition the right to run for office so as to exclude frivolous candidates. *Jenness* v. *Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L. Ed. 2d. 554 (1971); *Bullock* v. *Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L. Ed. 2d. 92 (1972).

However, since such regulations are likely to burden the right to associate for political purposes and the right to

vote they will be subjected to close judicial scrutiny. *Williams* v. *Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L. Ed. 2d. 24 (1968); *Dunn* v. *Blumstein*, 465 U.S. 330, 92 S.Ct. 995, 31 L. Ed. 2d. 274 (1972).

Prior decisions of this Court have made it clear that States can require a minor party or an independent candidate to demonstrate a significant modicum of support in order to gain access to the ballot. *Jenness* v. *Fortson*, *supra*; *Stores* v. *Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L. Ed. 2d. 714 (1974).

Thus it could be argued that Illinois could have required that minor party and independent candidates demonstrate support equal to 5% of the electorate for the office they wish to contest. *Jackson* v. *Ogilvie*, 403 U.S. 925, 91 S.Ct. 2247 (1971). Summarily affirming 325 F. Supp. 864 (N.D. Ill., 1971).

However, this is not what Illinois has done. §§10-2 and 10-3 establishes two tests for such candidates. Perhaps due to an oversight in the way the statute was drafted, candidates for local office have a greater burden, both in relative and in absolute terms, than candidates for state-wide office.

Even if we assume that either test, standing alone, would withstand a constitutional challenge, it does not follow that a state can impose a relatively greater burden on a candidate for local office than that imposed on a candidate for state-wide office.

Even under conventional standards of review, legislative classifications violate the 14th Amendment guarantee of equal protection when arbitrary, irrational or when not reasonably related to the purpose of the legislation. *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U.S. 457, 80 S.Ct. 474 (1960); *Morey* v. *Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L. Ed. 2d. 1485 (1957).

Such classification must insure that all persons similarly situated will be treated alike, *Reed* v. *Reed* (1971) 404 U.S.

71, 92 S.Ct. 251, 30 L. Ed. 2d. 225; *Jenness* v. *Fortson*, *supra*.

Appellants have advanced no rationale explaining why the State would require candidates for office in Chicago or Cook County to demonstrate more support than candidates for state-wide office. Nor can any be imagined.

Even if some rationale for the added burdens placed on candidates for office in Chicago or Cook County could be articulated, §§10-2 and 10-3 are clearly unconstitutional.

Because of the important constitutional rights involved, more than the conventional standard described above is required.

The statute must not only be rationally related to a legitimate state interest, but must accomplish that objective by means which do "not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." *Lubin* v. *Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L. Ed. 2d. 702 (1974).

§§10-2 and 10-3 represents an additional burden on candidates for office in Chicago and Cook County which is both unnecessary and unfair. It is unnecessary because Illinois has determined that the support of 25,000 voters on a state-wide basis is sufficient to screen out frivolous candidates. It is unfair because minor party and independent candidates are required to expend their limited resources complying with an requirement which is unnecessary.

The additional burden placed on minor party and independent candidates for office in Chicago and Cook County deny Appellees equal protection of the law because it establishes an irrational and arbitrary classification without any rational relationship to a legitimate state interest.

Accordingly, §§10-2 and 10-3 cannot withstand scrutiny under conventional standards let alone under the close

scrutiny applied to statutes that burden important constitutional rights.

Furthermore, the added burden imposed by this statute, unconstitutionally burdens Appellee's rights of association and voting by requiring them to spend valuable resources complying with a requirement which is not rationally related to the states interest in excluding frivolous candidates.

II.

THE PRIOR DECISIONS RENDERED IN *JACKSON* v. *OGILVIE* ARE NOT CONTROLLING IN THE INSTANT CASE.

Appellants have argued that the decisions rendered by the District Court and the Court of Appeals in this case violate the principle of *stare decisis* or in the alternative violate *the law of the case*.

The doctrine of *stare decisis* does not apply to this lawsuit because the issue decided in *Jackson* v. *Ogilvie, supra,* is totally different from the issues decided by the Court of Appeals in this case.

Plaintiffs in *Jackson* v. *Ogilvie* contended that the requirement of the Illinois Election Code, §10-3 requiring independent candidates to submit petitions signed by qualified voters equal in number to 5% of those who voted in the last election for Chicago denied them ballot status because of the *amount* of signatures required. The District Court held that a 5% requirement was not unconstitutional in light of *Jenness* v. *Fortson, supra.*

In the instant case, Appellees have argued that the requirement of §§10-2 and 10-3 are unconstitutional as applied to elections in Chicago and Cook County, not because the amount, standing alone, is unconstitutional, but because

it exceeds the requirement for obtaining ballot status to contest state-wide elections.

This issue was simply not discussed nor decided in *Jackson* v. *Ogilvie, supra.*

Appellant urges that the doctrine of *stare decisis* applies because the issue raised by appellees in the instant case was implicitly or potentially present in *Jackson* v. *Ogilvie.*

The doctrine of *stare decisis* is designed to insure a uniformity of legal principles, not a uniformity of results.

Thus, it is clear that;

> "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster* v. *Fall,* 266 U.S. 507, 511 (1925) citations omitted; See *United States* v. *L. A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37-38 (1952).

Appellants, recognizing the weakness of their arguments for application of the doctrine of *stare decisis* to this case, have argued that the doctrine of the *law of the case* makes *Jackson* v. *Ogilvie* finding a sort of appellate *res judicata.*

Appellants have cited Moore, *Federal Practice,* §0.404(1), p. 403 and *Antonioli* v. *Lehigh Coal and Navigation Co.,* 451 F. 2nd 1171 (3rd. Cir. 1971) as supporting the application of the doctrine of the *law of the case* to these proceedings.

A cursory review of Moore, *Federal Practice,* §0.404(1) discloses the following caveats with regard to the application of this doctrine to the instant case.

> "The general American doctrine is that a court is not inexorably bound by its own precedents, but in the interest of uniformity of treatment of litigants and of stability and certainty in the law will follow the relevant rule of law which it has established in earlier cases, unless clearly convinced that the legal rule

was originally erroneous or is no longer sound because of changed conditions and that more good than harm would come by departing from precedent. These same principles should, and in the main do, determine the doctrines of the law of the case for the federal courts." p. 401;

"As in the case of stare decisis, the federal doctrine of the law of the case applies to *principles* of law enumerated by the trial court and by the appellate courts." (emphasis added) p. 402.

"Normally the 'law of the case' may not be properly inoohed where the case is not the same; or where, although the case is the same, the matter now presented was not previously determined." pp. 403, 404.

Thus it is clear that the same principles which exclude the use of *stare decisis* to hold that *Jackson* v. *Ogilvie, supra,* is controlling, compel us to reach the same conclusions regarding the *law of the case.*

A reading of the authorities cited by Appellant makes it clear that the *law of the case* is designed to insure finality of decision in a single case. *Moore, supra,* pp. 401-406.

Appellants have attempted to extend this doctrine to subsequent litigation by confusing identity of parties with parties having an identity of interest. To do so would remove all meaningful distinctions between *res judicata, stare decisis* and *the law of the case.*

By omitting salient facts, Appellants have attempted to misapply the *Antonioli* case to the present case.

In *Antonioli, supra,* despite a change in name parties, the parties were identical.

"Although the named parties are different, both suits were class actions on behalf of all employees . . ." note 1177, p. 177.

The limited applicability of the *law of the case* was explained in *Antonioli, supra,* to mean;

". . . A second appeal may not be used to raise questions *in the same case* already put to rest by the same court upon a prior appeal." (emphasis added, citations omitted) p. 1178.

By distorting this doctrine, Appellants have tried to apply what in reality is the doctrine of *res judicata* to a subsequent case brought by different parties.

Appellants hope to avoid the need to put forth a rationale for a patently irrational statutory anomaly. The reason is obvious; they can not advance a rational justification for a requirement in Chicago greater than the 25,000 signatures required for state-wide elections.

CONCLUSION

For the reasons stated above, the Respondent, Socialist Workers' Party, *et. al.,* urges this Court to affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Ronald Reosti

Reosti & Papakhian

658 Pallister Avenue
Detroit, Michigan 48202

Lance Haddix

33 North Dearborn Street
Room 815
Chicago, Illinois 60602

Attorneys for Appellees other than the Chicago Board of Election Commissioners

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-1248

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Defendant-Appellant,

vs.

SOCIALIST WORKERS PARTY, ET AL.,
Plaintiffs-Appellees.

CONSOLIDATED WITH

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

vs.

GERALD ROSE, ET AL.,
Plaintiffs-Appellees,

CHICAGO BOARD OF ELECTION COMMISSIONERS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE—CHICAGO BOARD OF ELECTION COMMISSIONERS.

THOMAS A. FORAN,
IAN H. LEVIN,
FORAN, WISS & SCHULTZ,
30 North LaSalle Street,
Suite 3010,
Chicago, Illinois 60602,
Telephone: 368-8330,
Attorneys for Chicago Board of Election Commissioners.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE—CHICAGO BOARD OF ELECTION COMMISSIONERS.

QUESTIONS PRESENTED.

1. Whether this Court has jurisdiction to hear on appeal a challenge to the United States Court of Appeal's determination that a certain question was moot, where the mootness ruling does not involve the constitutionality of a State statute.
2. Whether any question of the Board of Election Commissioner's authority to agree to an order "solely as applied" to one particular special election is moot.
3. Whether the Appellant—State should be heard to complain of the District Court's and Chicago Board's alleged lack of authority to consent to a court order where the Appellant—State had agreed to an *identical* type order earlier in the same cause.
4. Whether the conduct of the Board of Commissioners in consenting to an order was proper and lawful.

SUMMARY OF ARGUMENT.

INTRODUCTION.

The Board of Election Commissioners of the City of Chicago, (hereafter called "The Board") was a Defendant in these consolidated cases in the District Court. The Board, however, did not appeal from the District Court's decision(s). The Board, therefore, will respond here *only* to the argument directed at it, as an Appellee, by the Appellant-State Board of Elections in its brief. (Argument II, pp. 17-21)

I.

A. The State Board of Elections here seeks to challenge the decision of the United States Court of Appeals that the question of the authority of the Chicago Board of Election Commissioners to submit to an agreed order of court "solely as applied" to a certain Special Mayoral Election was moot. As the mootness ruling of the Court of Appeals does not involve the constitutional validity of a State statute, this Court lacks jurisdiction to hear this issue on appeal. Title 28 U. S. C. § 1254.

B. Moreover, by the very terms of the order itself, the order lowering signature requirements and extending the filing deadline for all New Parties and Independents was explicitly restricted *solely* to one specific special election. This election is now long over. The order challenged expressly states that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977", certain requirements will be as therein stated. As the order intentionally has no precedential value beyond the specific June 7, 1977 election concerned, the issue is clearly moot. (*North Carolina* v. *Rice,* 404 U. S. 244 (1971); *Mills* v. *Green,* 159 U. S. 651)

C. Even if this Court determines that the Court of Appeals erred in dismissing the State's appeal on mootness grounds, this Court is not a proper forum to consider in the first instance any issue of the Board's authority to enter into judicially approved settlements. This issue should be remanded to the District Court, or the Court of Appeals, for a hearing and/or determination as to this issue.

D. The State should not be heard to complain about the Board's lack of authority, as earlier in the same cause it agreed to an *identical* type order lowering the signature requirements and extending the filing deadline for Independent candidates. (App., p. 60)

E. The conduct of the Chicago Board of Election Commissioners was proper and lawful. The order challenged involved signature and filing deadline requirements for a *special* election. The relevant Illinois provisions make no distinction between a regular statutorily scheduled election and a *special* election to fill an unexpected vacancy, such as was involved in this cause. In other words, the relevant Illinois provisions are structured solely for regularly called elections where the date of the election is known well in advance and petition work can be organized and open-endedly begun well in advance of the final filing date. However, the effect of the application of this statutory set up for regularly scheduled elections to the unexpected special election here was to cause a lack of prior notice and an unreasonably short frame for filing as applied to this special election situation.

The order concerned thus reflects *inter alia* the District Court's determination after reviewing the case facts in a pre-trial conference, that as a factual matter the Illinois filing deadline provisions and provisions requiring 25,000 signatures to run as an Independent or New Party mayoral candidate were unconstitutional, not facially, but *solely as applied* to the special election concerned. The Chicago Board's consent to this order of the District Court, extending the filing deadline and lowering the

signature requirements to 20,000 for all independent candidacies, was merely an acknowledgment, a confession of error, that the filing deadline and 25,000 signature requirement were to that extent unconstitutional *as applied* to the particular special election concerned, at the same time the agreed order preserved the legitimate governmental interest in assuring that only candidates demonstrating significant voter support would attain a position on the ballot.

ARGUMENT.

I.

THIS COURT LACKS JURISDICTION TO REVIEW ON APPEAL A FEDERAL COURT OF APPEALS RULING THAT A CHALLENGE TO A DISTRICT COURT ORDER IS MOOT.

The State Board here seeks to challenge the United States Court of Appeals decision, which dismissed as moot the State's claim that the Chicago Board of Election Commissioners lacked authority to agree to an Order of Court "solely as applied to the Special Mayoral Election" held in Chicago on June 7, 1977. (App., p. 74) The State Board asserts that this issue should not have been considered moot and it thus seeks to appeal here from that portion of the Court of Appeals' decision.

However, this Court's jurisdiction on appeal is expressly limited to those cases in which "a party (relies) on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, Treaties or Laws of the United States . . . and the review on appeal shall be restricted to the federal question presented." 28 U. S. C. § 1254.

Simply put, the mootness ruling of the Court of Appeals does not involve the constitutional validity of a State statute. Consequently the issue may not be heard by this Court on appeal. (see, *e.g., Bradford Electric Light Co., Inc.* v. *Clapper,* 284 U. S. 221 (1931); *Baxter* v. *Continental Casualty Co.,* 284 U. S. 578 (1931).

The State Board's purported appeal of the mootness ruling by the Court of Appeals thus should be dismissed.

II.

ANY QUESTION OF THE BOARD'S AUTHORITY TO AGREE TO AN ORDER "SOLELY AS APPLIED" TO THE SPECIAL ELECTION CONCERNED IS MOOT.

A.

In preface, what was involved here was not a General Election, whose time is fixed by statute, but the first known Special Mayoral Election in the City of Chicago's history. This resulted in a correspondingly very short time frame under statute in which independent and third party candidates could gather petitions. Thus, this was a rare, perhaps even *sui generis,* situation. At the District Court's behest, and with its conference participation, the Chicago Board agreed to an Order *solely* for this special election, lowering the general statutory signature requirements for all Independent and New Party candidates from 25,000 to 20,000 signatures and extending the filing deadline by two weeks.

The State contends that the issue of the Board's action, is "still alive for future elections" and thus is not moot. (Appellant's Brief, p. 19) The State is somewhat obtuse. It fails to appreciate that by the very terms of the order challenged, the order has no precedential value beyond the instant case and election. The order, recognizing the unique character of the instant case, is expressly limited solely to that single, special election. The order explicitly states that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977" the requirements for ballot access will be as therein stated. (App., p. 74) It was only on this non-precedential basis that the Board accepted this order solely for the Special Election concerned. The issue, therefore, is clearly moot. (*e.g., North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971); *Mills* v. *Green,* 159 U. S. 651).

The cases cited by the State are irrelevant here. They all involved the validity of *statutes* which had continuing future effect. None of them concerned, as here, an *order* explicitly

restricted to one election, and one election only. The cause here does not involve a challenge to a state statute involving elections, as the state tries to suggest. (Appellant's Brief, p. 20) It merely involves an attempted challenge of an isolated court order. As the order here, by its very terms, is explicitly restricted solely to just one election which is long over, the issue is not "capable of repetition, yet evading review." Or as the Court of Appeals for the Seventh Circuit here reasoned:

> "The order stated categorically that it applied only to the June 7, 1977 Special Mayoral Election which has long passed. Furthermore, this is not an issue which is 'capable of repetition, yet evading review.' *Defunis* v. *Odegaard,* 416 U.S. 312, 318-19 (1974); *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911). We have no reason to believe that a future agreement by an election board to reduce signature requirements and extend filing deadlines in a special election situation, albeit an unlikely occurrence, would evade review. For this reason we dismiss the appeal of the March 17, 1977 order." (Appellant's Jurisdictional Statement App., p. 6a.)

B.

In the alternative, *arguendo,* if this Court should disagree with the Court of Appeals' determination that the issue is moot, this issue of the District Court's and the Board's authority to enter into the Order concerned should be remanded to the Court of Appeals, or the District Court, for a hearing and/or determination as to this issue. It is respectfully submitted that this Court is not the proper forum for the determination of this issue in the first instance.

III.

THE STATE BOARD SHOULD NOT BE HEARD TO COMPLAIN OF THE DISTRICT COURT'S AND CHICAGO BOARD'S ALLEGED LACK OF AUTHORITY.

The State Board should not be heard to complain about the lack of authority of an electoral body in a situation, as here. Earlier in this very same cause, the State Board agreed to an *identical* type order lowering the statutory signature requirements for independent candidates from 63,373 to 35,947 and extending the statutory filing deadline for Independents to April 4, 1977 for this Special Mayoral Election, even though the statute called for a February 19, 1977 filing deadline. (App., p. 60; Ill. Rev. Stat. 46, Par. 10-3)

IV.

THE CONDUCT OF THE CHICAGO BOARD OF ELECTION COMMISSIONERS WAS PROPER AND LAWFUL.

The issue raised by the State Board involves the authority to enter into an agreed order of court "solely as applied" to the Special Mayoral Election concerned. For New Party and Independent candidates, the order lowered the signature requirements from 25,000 to 20,000 and it extended the filing deadline for fourteen days to the day preceding the Special Mayoral Primary Election.

Initially, the Chicago Board strenuously agrees that statutory signature and filing deadline statutes are mandatory and can't be administratively altered. The State Board, however, fails to apprehend the nature of the issue. The March 17 agreed order did not address the *facial* validity of a statute, as a matter of law. Rather it related to the constitutionality of the signature and time filing statute, as *applied* to this unique special election. The validity of this statute, as so applied, is by nature a *factual* issue and thus subject to factual resolution.

The Illinois signature and filing deadline provisions concerned are structured *solely* for regularly statutorily scheduled elections, where the date of the election is known well in advance and there is no barrier to the early circulation of petitions. (Appellant's Jurisdictional Statement App., p. 18a) The Illinois signature and filing deadline provisions, however, make no distinction whatever between a regular election and a special election. The filing deadline and signature requirements are the same for both types of elections. These provisions, therefore, make absolutely no time or signature allowances for the time problems of an Independent type candidacy in an unexpected Special Mayoral Election caused by death. The effect of the application of statutory set up for regularly scheduled elections to this particular special election to fill an unexpected vacancy thus caused a lack of prior notice and an extremely short time frame for filing petitions by all New Party and Independent candidates. It also failed to allow for the fact that the most fruitful time for circulating such petitions is during the closing weeks of the regular parties' primary campaigns. (Appellant's Jurisdictional Statement App., p. 30a)

The Order concerned thus reflects the District Court's recognition and determination, after reviewing the case facts in a pretrial conference, that as a factual matter the Illinois signature and filing deadline provisions for regular elections were unconstitutional as applied to the Special Mayoral Election concerned. The Chicago Board's agreement to this Order was merely an acknowledgement, or even a confession of error, that to the extent the Illinois provisions required more than 20,000 signatures and a truncated 51 day filing deadline they were, as a factual matter, unconstitutional as applied to the special election concerned.*

* "Compromises of disputed claims are favored by the courts." (*Williams* v. *First National Bank*, 216 U. S. 582). In this regard, in addition to the factors described above, the Chicago Board appropriately considered, too, the fact that the Appellee's signature gathering efforts were, in effect, further shortened and psychologically hampered by the fact that they did not know until well into the case what the final maximum signature and deadline requirements would be and thus whether such requirements could potentially be attained.

(Footnote continued on next page.)

It bears noting that the State Board's assertion that the Board altered the statutory requirements is not an accurate characterization of what transpired below. First, it requires stating that the United States District Court, not the Board, lowered the signature requirements and extended the time filing requirements. (App., p. 74). The Board agreed to this District Court Order, after a conference with the Court's participation, under the following circumstances: three days earlier, on March 14, 1977, the District Court had issued a 27 page opinion. In that opinion, the Court *inter alia* had strongly implied that, after an evidentiary hearing, it would further lower the signature requirements for this election from the 25,000 signature maximum to which it had already lowered it without any evidentiary hearing and it would extend the filing deadline to April 18, 1977 (the day preceding the Special Mayoral Primary). (See, e.g., Appellant's Jurisdictional Statement App., pp. 23a, 26a [FN 16], 28a, 32a) Further, and critically, the final sentence of the District Court's opinion then mandated a pretrial conference on March 17, 1977 to schedule a hearing and "to possibly reach a *stipulated agreement* for the regulations pertaining to the instant Mayoral Election". (Emphasis added) (Appellant's Jurisdictional Statement App., p. 32a) Further, in their pleadings, the U. S. Labor Party was requesting that the signature requirements for this election be lowered to 6,545 and the Socialist Workers Party was requesting automatic ballot access without any signature filing requirement whatever. The Board thus was faced with the specter, among other things, of an unmanageable "laundry list" ballot and the administrative and other evils attendant thereto. (See, e.g., *Lubin* v. *Panish*, 415 U. S. 709,

(Footnote continued from preceding page.)

The State Board also seeks to allege that the Board's action contravened the State's supervisory authority under State law. First, the State Board did not seek to assert this issue at the District Court level and it is thus now waived. Secondly, the State's alleged supervisory authority under State law is irrelevant to the alleged Federal questions it seeks to raise here. Finally, there is nothing in State law which confers on the State Board the power or dictatorial authority over the Chicago Board that it seeks to assert here. e.g. Ill. Rev. Stats. Chap. 46 Par. 1A-8.

715-719; *American Party of Texas* v. *White,* 415 U. S. 767, 781-782)

In this case climate, the agreed order for one, was a recognition of reality by the Board, which, nonetheless, still protected for this Special Mayoral Election the legitimate governmental interest against a "laundry list" ballot; assured that only new party or Independent candidates demonstrating significant voter support would attain a position on the ballot;* fulfilled the Board's administrative need to finally set the election calendar and the identity of candidates sufficiently before the election to allow election preparation; and avoided a time-consuming, costly, and probably less successful evidentiary hearing.

There was another pivotally important policy reason why the Chicago Board agreed to an order, lowering signature requirements to 20,000 and extending for two weeks the filing deadline, "solely as applied" to this particular election. After the District Court's Memorandum Opinion of March 14, 1977, in which both sides believed that the Court had mandated them to seek to negotiate a resolution for this election, the New Political Party plaintiff represented to counsel for the Board that in view of the short notice time existing for this election, the New Party still most probably would not be able to make 25,000 signatures by April 18, 1977. The plaintiffs stated that they hopefully could make 15,000 and would even try to make 20,000 signatures by April 18th, if this was the limit of what the Board would accept. The present Chicago Board believes that it should, within the scope of its authority, equally and neutrally favor access to the ballot by all qualified candidates. The Board thus felt, that in the interst of justice and the public interest, it should be flexible as applied to this unique election

* The two plaintiffs-appellees were the only Independent parties or Independent candidates to subsequently attain placement on the ballot.

situation and not rigidly adhere to a technical numbers game, solely to prevent all professedly diligent new political parties from attaining ballot access. As counsel for the Chicago Board stated to the District Court earlier in this cause on February 11, 1977:

> "I think we have some responsibility as an Election Authority to be neutral and to help people get on the ballot rather than to be obstructive. . . ." (P. 8.)

And:

> "I think that that is fair and that's an effort to try to help these people get on the ballot. . . ."

The Chicago Board, therefore, agreed to the negotiated order concerned, for the public benefit of all Legitimate New Party and Independent candidacies.

Finally, the State's suggestion that the Board violated equal protection rights of other new political parties is ludicrous. The State is the one that maintains that the signature requirements for New Political Parties in local elections must remain at 25,000, 35,000 or even 58,000. Meanwhile, the Chicago Board in an effort to assist duly qualified candidacies agreed to lower the signature requirement here to 20,000 equally for *all* New Political Parties and Independent candidates. It is the State Board of Elections, not the Chicago Board, which has been completely insensitive to the problems of new political parties and independent candidates throughout these proceedings. The Board's agreement to an Order to *lower* the signature requirements equally for all new parties and independent candidates from 25,000 to 20,000, *thus making it easier for all new parties to gain ballot access,* clearly does not constitute a violation of the equal protection clause.

Wherefore, the conduct of the Chicago Board in this case was clearly proper and lawful.

CONCLUSION.

For reasons stated above, the Respondent Board of Election Commissioners of the City of Chicago urge that as to the matters contained in Appellant's argument II, this Court either dismiss the appeal or affirm the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS A. FORAN,
IAN H. LEVIN,
FORAN, WISS & SCHULTZ,
30 North LaSalle Street,
Suite 3010,
Chicago, Illinois 60602,
Telephone: (312) 368-8330,
Attorneys for Appellees, Board of Election Commissioners of the City of Chicago, John H. Hanly, Marie Suthers and Howard C. Medley, Jr.

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IN THE

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OCTOBER TERM, 1977

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Plaintiffs-Appellees,

and

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR.,
Defendants-Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF OF APPELLEES GERALD ROSE, U.S. LABOR PARTY, ET AL.

JEFFREY D. COLMAN
JAYNE W. BARNARD
JENNER & BLOCK
One IBM Plaza - Suite 4300
Chicago, Illinois 60611
(312) 222-9350

WILLIAM H. LUKING
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza - Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Counsel for Appellees,
Gerald Rose,
U.S. Labor Party, et al.

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On Appeal From The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF APPELLEES GERALD ROSE, U.S. LABOR PARTY, ET AL.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 566 F.2d 586 (7th Cir. 1977) and is set forth in the Appendix to the Jurisdic-

tional Statement at pp. 3a-6a.[1] The memorandum opinion of the district court dated March 14, 1977 is reported at 433 F. Supp. 11 (N.D. Ill. 1977) and is included in the Appendix to the Jurisdictional Statement at pp. 7a-32a. The order entered by the district court on March 17, 1977 is set forth in the Appendix to the Jurisdictional Statement at p. 39a and in the joint Appendix at p. 74.

ISSUES PRESENTED

1. Whether state election statutes which require independent candidates and new political parties to obtain more nominating signatures to secure ballot placement in a local election in the City of Chicago than independent candidates or new political parties are required to obtain to secure ballot placement in elections for statewide offices violate the rights of Chicago independent candidates and new political parties and their supporters to the equal protection of the laws.

2. Whether the lower courts in this case were bound by the summary affirmance in *Jackson v. Ogilvie* even though the issues presented in this case were neither presented to nor decided by this Court in *Jackson.*

3. Whether the court of appeals properly held that the issue whether the Chicago Board of Election Commissioners had statutory authority to negotiate and enter into a settlement agreement which by its own terms applied only to the 1977 special election was moot by the time the case was heard in the court of appeals.

[1] The Appendix to Appellant's Jurisdictional Statement hereinafter will be referred to as "J.S. App. . ." References to the joint Appendix filed in this Court are designated "App. . ."

STATEMENT OF THE CASE

The Honorable Richard J. Daley, Mayor of the City of Chicago, died on December 20, 1976. Under Illinois law, the Chicago City Council was required to declare the office of Mayor vacant and to fill the vacancy within six months. Ill. Rev. Stat., Ch. 24, § 3-4-6. On January 13, 1977, the City Council ordered a Special Mayoral Election to be held on June 7, 1977.

The Chicago Board of Election Commissioners (the "Chicago Board") is an independent local governmental body which consists of three officers appointed by the Circuit Court of Cook County. Ill. Rev. Stat., Ch. 46, § 6-21.[2] On or about January 18, 1977, after the City Council called the Special Mayoral Election, the Chicago Board issued an election calendar.

The calendar granted "independent candidates" until February 19, 1977 to obtain and file the signatures of 35,947 qualified Chicago voters to secure positions on the ballot in the Special Mayoral Election.[3] "New political parties" were granted until April 4, 1977 to obtain and file the signatures of 63,373 voters to secure positions on the ballot for the same election.[4] These figures purport-

[2] Boards of election commissioners may be created by any municipality by vote of the municipality's electors. The City of Chicago adopted a board of election commissioners on November 3, 1885. *See People ex rel. Grinnell v. Hoffman*, 116 Ill. 587, 5 N.E. 596, 8 N.E. 788 (1886). Under Illinois law, municipal boards of election commissioners "have charge of and make provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time . . ." Ill. Rev. Stat., Ch. 46, § 6-26.

[3] The definition of "independent" candidates is set forth in Ill. Rev. Stat., Ch. 46, § 10-3, which is set forth in Appendix B to this brief.

[4] "A new political party" is defined in Ill. Rev. Stat., Ch. 46, § 10-2, which is set forth in Appendix A to this brief

edly were required by Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3, which establish the minimum signature requirements for independent candidates and new political parties running in local elections as 5% of the entire vote cast in the last preceding election for the office being sought.[5]

The Complaint

The complaint of Gerald Rose, the U. S. Labor Party, and others ("the *Rose* complaint"), was filed on January 31, 1977. Gerald Rose was an independent candidate for mayor, the U. S. Labor Party was a "new political party", and the remaining plaintiffs were qualified voters who supported Rose and/or the U. S. Labor Party. Defendants John Hanly, Marie H. Suthers and Howard C. Medley, Sr., were the members of the Chicago Board. Because the complaint attacked the constitutionality of state statutes, the State Board of Elections (the "State Board") intervened as a party defendant pursuant to 28 U.S.C. § 2403.[6]

The *Rose* complaint challenged, on First and Fourteenth Amendment grounds, both the filing dates and the signature requirements imposed by the Chicago Board in its calendar for independent candidates and new political parties. Essentially, plaintiffs maintained that their First Amendment rights were unreasonably

[5] The signature requirement for independent candidates and new political parties should have been identical. The Chicago Board later acknowledged the arithmetic error which resulted in differing signature requirements. *See* note 8, *infra* at p. 5.

[6] The State Board is a state agency charged with the "general supervision over the administration of the registration and election laws throughout the State." Ill. Const., Art. III, § 5 (1970); Ill. Rev. Stat., Ch. 46, § 1A-1.

burdened because they had an extremely limited period of time to gather the requisite number of signatures. Plaintiffs' First Amendment claims were not decided below.

The *Rose* plaintiffs also alleged that Ill. Rev. Stat., Ch. 46, §§ 10-2 and 10-3 unconstitutionally deprived plaintiffs of their right to equal protection of the laws under the Fourteenth Amendment because independent candidates and new political parties seeking ballot positions in the Chicago mayoral election were required to obtain 35,947 and 63,373 signatures respectively, while independent and new party candidates for statewide officers, pursuant to the same statutory provisions, needed only 25,000 signatures to attain ballot position in statewide elections. (App. 40, 45.)[7]

Proceedings In The District Court

A. *The March 14, 1977 Memorandum Opinion*

On February 8, 1977, the *Rose* plaintiffs moved for a preliminary and permanent injunction substantially reducing the signature requirements and extending the filing deadlines for independent candidates and new political parties seeking ballot positions in the Special Mayoral Election.[8] (App. 47-51.) On March 14, 1977, the

[7] Because the issues in the *Rose* complaint were similar to those in a case filed by the Socialist Workers Party, et al., the two cases were treated as "related cases" in the district court pursuant to Local Rule 2.21(D)(1). The Socialist Workers Party complaint raised the same First Amendment claim as the *Rose* complaint, but did not raise the equal protection claim now before this Court.

[8] While these motions were pending, the Chicago Board and the State Board jointly announced that the filing deadline for independent candidates would be extended and that the signature requirement for new political parties would be reduced. The filing deadline and signature requirements for independent candidates and new political parties running in the Special Mayoral Election were made the same: April 4, 1977 and 35,947 signatures. The district court entered an order on February 11, 1977, giving effect to this agreement. (App. 60.) This order is not at issue before this Court.

district court issued a memorandum opinion (J.S. App. 7a-32a) and entered a permanent injunction against the Chicago Board, barring enforcement of those portions of Sections 10-2 and 10-3 requiring independent candidates or new political parties to file more than 25,000 signatures in order to secure ballot positions in the Special Mayoral Election and in future local elections.

The district court entered the injunction after concluding (J.S. App. at 26a):

> "The court cannot find any rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. . . . Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge the constitutional rights of independents, new political parties, and their adherents."

The district court rejected the argument that this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *summarily aff'd.*, 403 U.S. 925 (1971), foreclosed consideration of plaintiffs' equal protection challenge to Sections 10-2 and 10-3. The district court noted (J.S. App. at 24a):

> "The defendants counter that the contrast with the 25,000 requirement was considered in *Jackson v. Ogilvie*, supra. However, it appears that it was only referred to in passing in one sentence of a brief submitted by the defendants in that case. There is no discussion of this issue whatsoever in either the majority opinion or in the dissent. In such a situation there is little reason for this court to hesitate to reevaluate an important contention. This is particularly true where it is raised in the different factual context of the forthcoming special election."

B. *The March 17 Order*

A pre-trial conference, attended by all the parties including the State Board, was held on March 17, 1977. Thereafter, an agreement was reached between the *Rose* plaintiffs and the Chicago Board. The agreement was incorporated into an order entered by the district court on March 17, 1977, stating that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977," the signature requirement for independent candidates and new political parties would be further reduced from 25,000 to 20,000 signatures and the filing deadline would be extended from April 4 to April 18, 1977. (App. 74.)

C. *The Motion to Vacate*

The State Board moved to vacate both the permanent injunction and the order entered on March 17 incorporating the settlement, again relying on this Court's summary affirmance in *Jackson v. Ogilvie*. The district court denied this motion in a memorandum opinion dated April 6, 1977. (J.S. App. 33a-38a.) The court concluded (J.S. App. at 35a-36a):

> "Most importantly, the conclusion that the 5% requirement for Chicago mayoral candidates violated the equal protection clause was based upon an argument which was not considered by the *Jackson* court. The court has great respect for the principle of *stare decisis*, but is not bound by previous cases where different facts are alleged and new and persuasive legal arguments are raised." (Footnote omitted.)

The district court also reaffirmed its holding that the defendants had not demonstrated a necessary and compelling state interest, or even a rational basis, to justify the requirement that independent candidates and new political parties gather over 25,000 signatures for ballot

placement in the Special Mayoral Election while 25,000 signatures suffice under the same statutes for similarly situated candidates to obtain ballot placement in statewide elections.

Rose and the U. S. Labor Party gathered the necessary signatures and were on the ballot for the June 7, 1977 Special Mayoral Election.

Proceedings On Appeal

The State Board appealed from both the permanent injunction entered by the district court on March 14 and the March 17 order.[9] On December 9, 1977, the United States Court of Appeals for the Seventh Circuit issued an opinion (J.S. App. 3a-6a) adopting the district court's memorandum opinion and affirming the March 14, 1977 injunction order. (J.S. App. at 3a, 5a.)[10] The court of appeals dismissed as moot the State Board's appeal from the March 17 order. (J.S. App. at 6a.)

On March 9, 1978, the State Board filed its jurisdictional statement. This Court noted probable jurisdiction on April 24, 1978.

[9] The Chicago Board did not appeal from either of these orders and is present in this Court as an appellee.

[10] Because the court of appeals adopted the opinion of the district court, all references in this brief to the propriety of the district court's ruling are equally applicable to the judgment of the court of appeals.

SUMMARY OF ARGUMENT

(1) Sections 10-2 and 10-3 of the Illinois Election Code deprive plaintiffs of the equal protection of the laws by requiring independent candidates and new political parties seeking offices in the City of Chicago to obtain more signatures on nominating petitions than are required for independent candidates and new political parties seeking statewide office. Because the plaintiffs' fundamental First Amendment rights are at stake, this difference in treatment is constitutionally permissible only if it is necessary to protect a compelling state interest. The State Board has not demonstrated a compelling state interest, or even a rational basis, which could possibly justify the requirement that independent candidates and new political parties seeking local office in Chicago obtain more than 35,000 signatures to secure a place on the ballot, while similarly situated candidates and their supporters need obtain only 25,000 signatures for ballot placement in statewide elections.

(2) Rather than trying to demonstrate a compelling state interest, or even a rational basis, for the discrimination created by Sections 10-2 and 10-3, the State Board maintains that the lower courts could not enjoin the enforcement of Sections 10-2 and 10-3 because of this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D. Ill. 1971), *summarily aff'd*, 403 U.S. 925 (1971). Plaintiffs' equal protection challenge to Sections 10-2 and 10-3 was not raised in *Jackson* or decided by this Court's summary action in that case. Summary affirmances by this Court are binding on lower federal courts only with regard to the "precise issues presented and necessarily decided" by this Court's

action. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Consequently, this Court's summary affirmance in *Jackson* did not bar the lower courts from reaching the merits of plaintiffs' equal protection challenge to Sections 10-2 and 10-3.

(3) The court of appeals properly declared moot the issue of the authority of the Chicago Board to consent to the district court's March 17 order in this case, in light of the fact that the order had been limited expressly to the Special Mayoral Election and the Special Election was long past. Even assuming the issue was not moot, this Court should not inquire into the authority of the Chicago Board, vis-à-vis the State Board, to negotiate a settlement, but rather should remand the case for further proceedings, with instructions that the district court retain jurisdiction while the issue is resolved in the state courts.

ARGUMENT

I.

SECTIONS 10-2 AND 10-3 OF THE ILLINOIS ELECTION CODE DEPRIVE PLAINTIFFS OF EQUAL PROTECTION BY REQUIRING MORE SIGNATURES FOR BALLOT PLACEMENT IN CHICAGO ELECTIONS THAN IN STATEWIDE ELECTIONS.

The district court properly determined that Sections 10-2 and 10-3 of the Illinois Election Code deprive plaintiffs of their right to equal protection of the laws under the Fourteenth Amendment. Under Sections 10-2 and 10-3, independent candidates and new political parties seeking statewide office need only obtain 25,000 nominating signatures. However, as applied to elections in Chicago, the 5% rule in Sections 10-2 and 10-3 requires that independent candidates and new political parties obtain in excess of 35,000 nominating signatures to secure positions on the ballot.[11] The district court held that this classification in Sections 10-2 and 10-3 was not based on any compelling state interest, and, in fact, was unsupported by any rational state interest. The decision of the district court was correct and should be affirmed by this Court.

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[11] Application of the 5% rule results in signature requirements in excess of 25,000 only in the City of Chicago and Cook County. No other cities or counties in Illinois have a large enough voting population to be similarly affected by the 5% requirement. The impact of the 5% rule in Cook County is even more egregious than in Chicago. An independent candidate running for Cook County State's Attorney in the 1980 general election, for example, will have to secure 104,426 nominating signatures (5% of the 2,088,525 votes cast for that office in the 1976 election), while an independent candidate for statewide office (*e.g.*, Attorney General) would need only 25,000 signatures.

A. Where, As Here, Fundamental Rights Are At Stake, The State Must Demonstrate A Necessary And Compelling State Interest To Support The Dissimilar Treatment Of Similarly Situated Persons.

The Fourteenth Amendment provides that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This clause means, at a minimum, that the state may not arbitrarily accord privileges to or impose liabilities upon one class as opposed to another, unless some rational distinction exists between those included in and those excluded from the class.

> "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415 (1920). *See also Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1076 (1969).

In numerous cases, however, this Court has concluded that when fundamental rights are at stake, the state must establish that the classification in dispute is supported by a compelling state interest, and that the classification is necessary to further the state's interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (right to marry); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (right to vote); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (right of political association); *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969) (right to travel).

It is well established that the right to vote is a fundamental right. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667-68 (1966); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968). However, as this Court has recognized, "voters can assert their preferences only through candidates or parties or both." *Lubin v. Panish*, 415 U.S. 709, 716 (1974). Therefore, statutes such as Sections 10-2 and 10-3 which establish nominating requirements for independent candidates and new political parties necessarily affect the fundamental right to vote and the protected associational rights of the candidates and of all individuals who would support independent candidates and new parties.

In *Williams v. Rhodes, supra*, this Court reviewed the burdens placed on new political parties seeking access to the ballot and stated (393 U.S. at 30-31):

> "In the present situation the state laws place burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.' "[12] (Citations omitted.)

[12] *See also Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

When confronted with similar challenges to statutes alleged to impede independent or third-party candidacies or participation in the nominating process of a major political party, this Court has consistently invoked the "compelling state interest" standard of review. *Williams v. Rhodes, supra,* 393 U.S. at 38; *Storer v. Brown,* 415 U.S. 724, 728-31 (1974); *American Party of Texas v. White,* 415 U.S. 767, 780 (1974); *Bullock v. Carter,* 405 U.S. 134, 144 (1972); *Kusper v. Pontikes,* 414 U.S. 51, 58-59 (1973); *Cousins v. Wigoda,* 419 U.S. 477, 489 (1975). *See also First National Bank of Boston v. Bellotti,* ..... U.S. ....., 98 S.Ct. 1407, 1421 (1978). Because protected First Amendment freedoms are at stake in this case, the state's discriminatory treatment of plaintiffs is lawful only if the state can show a compelling interest which requires such discrimination.[13]

The district court in this case properly analyzed these principles and determined that the classification created by Sections 10-2 and 10-3 could be upheld only if the state demonstrated a necessary and compelling interest to support the classification. The court properly concluded that no state interest justified the requirement that plaintiffs obtain more than 25,000 signatures to obtain ballot placement in the Special Mayoral Election.

B. There Is No Compelling State Interest Requiring More Signatures On Nominating Petitions In Chicago Elections Than In Statewide Elections.

This Court has recognized very few state interests which may be sufficiently compelling to justify restrictions on political activity. *Rosario v. Rockefeller,* 410 U.S. 752, 761 (1973) (preservation of the integrity of the

[13] The State Board has never disputed plaintiffs' assertion that their fundamental, constitutionally-protected rights are involved in this case. Nor has the State Board challenged the fact that the "compelling state interest" test is applicable here.

electoral process); *Kusper v. Pontikes,* 414 U.S. 51, 59 (1973) (prevention of "raiding" by political parties); *Storer v. Brown,* 415 U.S. 724, 733 (1974) (stability of the political process). However, none of these interests is present in this case.

This Court has also acknowledged that there is a valid state interest in keeping frivolous candidates off the ballot, *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); *Lubin v. Panish,* 415 U.S. 709, 715-16 (1974), and in keeping ballots at a manageable size. *Bullock v. Carter,* 405 U.S. 134, 145 (1972). But, this Court has held that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Lubin, supra* at 716; *Kusper, supra,* at 59; *Williams, supra,* at 31-33. *See also First National Bank of Boston, supra,* at 1421; *NAACP v. Button,* 371 U.S. 415, 438 (1963); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

The State Board has never suggested that a signature requirement in excess of 25,000 is necessary to keep frivolous candidates off the ballot in Chicago elections. Nor has the State Board suggested that any other state interest justifies this discriminatory treatment of Chicago independent candidates and new political parties and their supporters.[14] The 25,000 signature requirement for ballot placement in statewide elections demonstrates that the state can satisfy any valid interest it may have by a maximum 25,000 signature requirement for ballot access in Chicago elections.

[14] In its "offer of proof" filed in the district court (App. 4, 9), the State Board offered only to prove that the U.S. Labor Party and the Socialist Workers Party *could* have met the existing (35,947 signature) statutory requirement. The State Board made no offer whatsoever concerning the state's interest in that requirement.

Indeed, even if the less strenuous "rational basis" standard were applied in this case, no rational basis exists for requiring a greater number of signatures in local petition drives than is required of similarly-situated candidates in statewide petition drives. At the hearing held on March 17, 1977, the district court specifically asked counsel for the State Board what rational basis supported the classification in question. Counsel was unable to suggest any rational basis for the classification. (App. 86-87.)[15]

In *Lendall v. Jernigan*, 424 F. Supp. 951 (E.D. Ark. 1977), *summarily aff'd*, 433 U.S. 901 (1977), the district court found no rational basis to support an analogous Arkansas statutory scheme. In *Lendall*, the district court struck down a requirement that an independent candidate for state senator secure more nominating signatures than required of an independent candidate for election to an office of an Arkansas municipality which was far more populous than the senatorial district. The court stated (424 F. Supp. at 958):

> "As pointed out in *Lendall v. Bryant* [387 F. Supp. 397 (E.D. Ark. 1975)], the qualifying requirement in Arkansas for independent candidates for municipal office is much less rigorous than that imposed upon such candidates for state and district offices. An independent candidate for municipal office may have his name placed on the ballot if he obtains petitions signed by not less than nor more than 50 qualified electors of the city or ward with respect to which he desires to run. See § 3-105(c).

[15] The State Board did attempt to offer a justification for the classification in oral argument before the court of appeals. There, counsel for the State Board contended that the classification was necessary because certain city officials are "more important" than state officeholders. No basis for that statement was offered by the state and none exists.

> Moreover, the law permits him to file his petition not later than 45 days before the general election. See § 3-105.1, Act 42 of 1972. When one compares the population of the city of Little Rock with state Senatorial District No. 3, it is obvious that the former has many more electors than the latter. But fewer signatures are required to qualify for the municipal ballot position than are required for an independent seeking to qualify as a candidate for Senatorial District No. 3. Traditionally, municipal elections have been nonpartisan in the sense that all candidates usually run as 'independents'. The legislation here under scrutiny reflects, arguably, a greater concern to protect candidates nominated in party primaries from opposition in the general election than to protect one 'independent' from another. This is not the type of concern that can be equated with the state's possible interest in avoiding voter confusion by limiting ballot access to those demonstrating significant voter support."

As in *Lendall*, no rational basis, let alone a compelling state purpose, exists for requiring more nominating signatures for a city-wide independent candidate or new political party than for a state-wide independent candidate or new political party.[16]

[16] In addition to violating the equal protection clause, the more burdensome signature requirements for independent candidates and new political parties seeking elective office in Chicago also violate the due process clause of the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 391-96 (1978) (Stewart, J., concurring); *Roe v. Wade*, 410 U.S. 113, 154-156 (1973), 167-171 (Stewart, J., concurring). State regulation of the nomination process affects the plaintiffs' fundamental rights and "liberties" protected by the due process clause. *Williams v. Rhodes, supra*, 393 U.S. at 30-31; *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958). Requiring more signatures on Chicago nominating petitions than the state requires on statewide petitions to meet the same state regulatory interests unnecessarily intrudes upon the plaintiffs' liberty interests. This intrusion violates the due process

(Footnote continued on following page)

C. This Court's Ruling In *Moore v. Ogilvie* Should Be Applied To This Case.

Section 10-2, one of the statutes challenged by *Rose*, was before this Court in *Moore v. Ogilvie*, 394 U.S. 814 (1969). At that time, Section 10-2 provided that independent candidates running for statewide office had to have nomination papers containing 25,000 signatures including "the signatures of 200 qualified voters from each of at least 50 counties." This Court invalidated the latter provision because (*Id.* at 818-19):

> "It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.
>
> "Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment."

In *Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), *cert. denied*, 423 U.S. 986 (1975), the *Moore* rationale was extended to strike down an amended version of Section 10-2 requiring that no more than 13,000 of the 25,000 signatures required of a new political party seeking to run candidates for statewide office could come from a single county. The court there stated (*Id.* at 522):

> "Assuming that a compelling need exists in Illinois to 'protect the integrity of its political processes from frivolous or fraudulent candidacies', *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857, 31 L.Ed.2d 92 (1972), we cannot see how this interest is tied by necessity to a discriminatory diminution of the power of the individual voter in Cook County, or any other urbanized county. Similarly, if there is a permissible and compelling state interest in limiting the total number of candidates or parties on the statewide ballot independent of the question of the seriousness or legitimacy of such candidates or parties, *some method is surely available which will serve this interest without making the effectiveness of an Illinois citizen's electoral power depend on his geographical location within that state.*" (Emphasis added.)

See also Communist Party of Illinois v. Ogilvie, 357 F. Supp. 105 (N.D. Ill. 1972).

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[16] *continued*
clause because it is overbroad. The state requirement of 25,000 signatures presents an adequate and viable alternative which is more narrowly drawn. Thus, only the 25,000 signature requirement should be imposed here. *See Zablocki, supra*, at 394 (Stewart, J., concurring); *Roe, supra*, at 155; *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1963).

Moreover, the circumstances relating to the Special Mayoral Election, particularly the limited amount of time available to gather the necessary signatures, rendered the application of the 5% requirement in this case overburdensome and impermissible under the First Amendment. *See Storer v. Brown, supra*, 415 U.S. at 742. This is an independent basis for affirmance.

Under Sections 10-2 and 10-3, 25,000 voters (wherever located in the state) can form a new political party or support an independent candidate for any statewide office. For example, 25,000 voters in Chicago could form a new political party, and secure general election ballot position for their candidates for United States Senator, Governor and other state officers. This new political party would be represented on every voting machine and every paper ballot in the State of Illinois, including the City of Chicago and Cook County. This same group of 25,000 voters, however, could not place a slate of candidates on the City of Chicago general election ballot for Mayor, Clerk and Treasurer since more than 35,000 signatures would be required. For Cook County offices, over 100,000 signatures would be required. Such a result is prohibited by *Moore v. Ogilvie.*

The decisions of the courts below should be affirmed.

II.

THIS COURT'S SUMMARY AFFIRMANCE IN *JACKSON v. OGILVIE* DID NOT PRECLUDE THE COURTS BELOW FROM REACHING THE MERITS OF THIS CASE.

The district court properly determined that this Court's summary affirmance in *Jackson v. Ogilvie*, 325 F. Supp. 864 (N.D.Ill. 1971), *summarily aff'd.*, 403 U.S. 925 (1971) did not preclude the court from reaching the merits of plaintiffs' equal protection claim. A summary affirmance is binding on lower courts only as to the "precise issues presented and necessarily decided" by this Court's summary action. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Because the equal protection question at issue in this case was neither raised in *Jackson* nor decided by this Court's summary affirmance, the district court was not precluded from reaching the merits of plaintiffs' equal protection challenge.

A. The Equal Protection Question At Issue In This Case Was Neither Raised Nor Decided In *Jackson v. Ogilvie.*

A review of the complaint, the district court opinion and the jurisdictional statement in *Jackson* demonstrates that the equal protection question at issue in this case was not presented to, or decided by, the three-judge court in *Jackson*, and it was not raised before or decided in this Court.[17]

In 1970, the Rev. Jesse Jackson attempted to run for Mayor of Chicago as an independent candidate. Jackson was required by the 5% rule in Section 10-3 to obtain approximately 58,000 signatures on his nominating petitions. *Jackson, supra*, 325 F. Supp. at 866. Jackson filed suit challenging, *inter alia*, the signature requirement.

Jackson's complaint, however, relied upon legal theories other than the one at issue before this Court. Jackson maintained that the 5% requirement in Section 10-3 invidiously discriminated against independent candidates in favor of candidates of established political parties. The majority of the three-judge court postulated the equal protection question at issue in *Jackson* as follows (*Id.* at 868.):

> ". . . under the equal protection measure we must determine whether [the 5%] requirement operates to discriminate against the plaintiff by depriving him of a right granted to candidates of established political parties."

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[17] For the Court's convenience, the jurisdictional statement filed in *Jackson* has been reprinted and is submitted herewith as Appendix C.

Noting that established party candidates were forced not only to secure nominating signatures but also to undergo the rigors of party nominating primaries, the majority of the three-judge court concluded that the collective barriers to ballot placement for candidates of established parties placed them "on an equal footing" with independents. *Id.* at 869. Thus, as between independents and traditional party candidates, Section 10-3 did not violate the equal protection clause.

The equal protection attack on Sections 10-2 and 10-3 in this case is completely different from the one made in *Jackson*. Rose's claim is not based on any alleged discrimination between the treatment afforded candidates of established parties and independent candidates. Rather, Rose's claim focuses on the dissimilar treatment afforded independent candidates and new political parties seeking office in the City of Chicago as compared to the treatment afforded the very same persons and parties seeking statewide office.

The equal protection question presented here was not in issue in *Jackson*. The complaint in *Jackson* made no reference to the 25,000 signature requirement for statewide offices. Neither the majority nor the dissenting opinions of the three-judge court made reference to this question. Moreover, the issue was not presented in the jurisdictional statement filed on behalf of Jackson in this Court.[18]

[18] In fact, in his jurisdictional statement, Jackson set forth the portion of Section 10-3 "applicable" to his case, but did not even include the first sentence of the statute which contains the 25,000 signature requirement for statewide elections. (App. C, attached hereto, at 16a-17a.) Thus, in *Jackson*, this Court was not even provided with a reference to the statutory classification which is now at issue in this case.

B. Summary Affirmances By This Court Bind The Lower Courts Only As To The Precise Issues Presented And Necessarily Decided By This Court's Action.

The State Board's assertion that the doctrine of *stare decisis*,[19] as represented by this Court's summary affirmance in *Jackson v. Ogilvie*, should have precluded the courts below from reaching the merits of the current challenge to Sections 10-2 and 10-3 is untenable in light of this Court's recent opinions in *Hicks v. Miranda*, 422 U.S. 332 (1975) and *Mandel v. Bradley*, 432 U.S. 173 (1977). *Hicks* and *Mandel* define for the lower courts the precedential value of summary dispositions by this Court. Contrary to the State Board's suggestion, summary affirmances do not preclude lower courts from hearing challenges to statutes which are brought on different grounds than those summarily affirmed by this Court in a previous case.[20]

[19] The State Board's reliance on the "law of the case" doctrine is totally misplaced. It is fundamental that this doctrine applies only when the parties and issues are the same. *In re Peer Manor Bldg. Corp.*, 143 F.2d 769, 770 (7th Cir. 1944), *cert. denied*, 323 U.S. 757 (1944); *Champlin Refining Co. v. Comm'r. of Internal Revenue*, 123 F.2d 202, 204 (10th Cir. 1941); *Fidelity & Deposit Co. v. Port of Seattle*, 106 F.2d 777, 781 (9th Cir. 1939), *cert. denied*, 309 U.S. 661 (1940).

[20] The precedential weight of this Court's summary dispositions has been widely discussed. *See* Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question By the Supreme Court After Hicks v. Miranda and Mandel v. Bradley*, 64 Va. L. Rev. 117 (1978); Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 Cin. L. Rev. 347, 365-67 (1977); Comment, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 Colum. L. Rev. 508 (1976); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B. U. L. Rev. 373 (1972). Confusion relating to summary dispositions by this Court has provided one basis for the U. S. Senate's consideration of The Supreme Court Jurisdiction Act of 1978 (S. 3100, 95th Cong., 2nd Sess.), a bill which would remove much of the obligatory, appeal by right, jurisdiction of this Court. *See* S. Rep. No. 95-985 (95th Cong. 2d Sess.), 7-8 (July 13, 1978).

In *Hicks v. Miranda*, 388 F. Supp. 350 (C.D. Cal. 1974), *rev'd*, 422 U.S. 332 (1975), a three-judge court had declared California's obscenity statute unconstitutional. The three-judge court stated that it did not consider itself bound by this Court's summary dismissal of a prior appeal from a state appellate court decision upholding the constitutionality of the same statute. *Miller v. California*, 418 U.S. 915 (1974) ("*Miller II*").

This Court ruled in *Hicks* that the district court erred in holding that it could disregard the decision in *Miller II*. *Hicks*, *supra* at 343. However, the mere fact of the summary disposition in *Miller II* was not dispositive. As Mr. Justice White noted (*Id.* at 345 n.14):

> "Of course, *Miller II* would have been decisive here only if the issues in *Miller II* and the present case were sufficiently the same that *Miller II* was a controlling precedent. Thus, had the District Court considered itself bound by summary dismissals of appeals by this Court, its initial task would have been to ascertain what issues had been properly presented in *Miller II* and declared by this Court to be without substance."

This Court applied the *Hicks* doctrine in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). In *Usery*, plaintiffs alleged that various provisions of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 901 et seq., as amended) were unconstitutional. A three-judge court rejected most of plaintiffs' challenges but found two provisions of the Act unconstitutional.

On appeal to this Court, the government asserted that the district court should not have decided the constitutional questions because of this Court's summary affirmance in *National Independent Coal Operators Ass'n. v. Brennan*, 372 F. Supp. 16 (D.D.C. 1974), *summarily aff'd*, 419 U.S. 955 (1974). However, this Court rejected this argument because the "summary affirmance in

[*Brennan*] did not foreclose the District Court's determination of unconstitutionality regarding [the two provisions in question], those issues not having been before us on the appeal." *Usery*, *supra*, at 14.[21]

In *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), this Court criticized the district court for its overly-strict adherence to this Court's summary affirmance in *Torres v. New York State Dept. of Labor*, 405 U.S. 949 (1972). According to Mr. Justice Powell, the Court erred by reading the summary affirmance in *Torres* "at its broadest." (*Id.* at 388-89 n.15) This Court concluded (*Id.*):

> "We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case."

In a concurring opinion, Mr. Chief Justice Burger stated (*Id.*, at 391-92):

> "When we summarily affirm, without opinion, the judgment of a three-judge court we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."

See also Pressler v. Blumenthal, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring.)

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[21] Similarly, in *McCarthy v. Philadelphia Civil Service Comm'n.*, 424 U.S. 645, 646 (1976), the Court noted that summary affirmances in two prior cases rejecting due process and equal protection challenges to ordinances requiring firemen to live in the city in which they worked did not preclude consideration of McCarthy's claim that a similar ordinance violated his fundamental right to travel.

In *Mandel v. Bradley*, 432 U.S. 173 (1977), this Court expanded upon its statements in *Hicks* and *Fusari* and more fully defined the precedential value for lower courts of this Court's summary dispositions (*Id.* at 176):

> "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved."

In *Mandel*, plaintiffs challenged an early filing deadline for independent candidates seeking statewide and federal offices. The early filing deadline was similar to one found unconstitutional in *Tucker v. Salera*, 399 F. Supp. 1258 (E.D. Pa. 1975), *summarily aff'd.*, 424 U.S. 959 (1976). The district court in *Mandel* ruled that the early filing deadline was unconstitutional because "*Salera* decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it." *Mandel*, at 176-77.

This Court noted, however, that the statute at issue in *Salera* provided that the necessary signatures had to be obtained during a limited 21-day period. No such limitation was contained in the Maryland statute at issue in *Mandel*. Because the statute in *Salera* was sufficiently distinguishable from the one in *Mandel*, this Court ruled that the district court erred in concluding that it was bound by the summary affirmance in *Salera*. This Court remanded the case for a full examination of the merits of plaintiffs' claim.

In a concurring opinion, Mr. Justice Brennan restated his view (previously expressed in his dissent from the denial of certiorari in *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 923 (1976)) that a lower federal court should give "appropriate, but not necessarily conclusive, weight to our summary dispositions." Commenting on the per curiam opinion in *Mandel*, Mr. Justice Brennan stated (432 U.S. at 179-80):

> "The Court by not relying on our summary affirmance in *Tucker v. Salera*, 424 U.S. 959 (1976), and *Auerbach v. Mandel*, 409 U.S. 808 (1972), effectively embraces [the position expressed by Justice Brennan in *Colorado Springs*], and vividly exposes the ambiguity inherent in summary dispositions and the nature of the detailed analysis that is essential before a decision can be made whether it is appropriate to accord a particular summary disposition precedential effect. After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative non-constitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, 'appropriate, but not necessarily conclusive, weight' is to be given this Court's summary dispositions."

The majority opinion and Mr. Justice Brennan's concurring opinion in *Mandel* both make it clear that the courts below should not have considered themselves bound by this Court's summary affirmance in *Jackson* unless the issue before the courts was necessarily decided by this Court's summary action in that case. In fact, even if this Court had granted full plenary review in *Jackson*, this Court's decision would not have been binding on the lower federal courts except as to those issues raised and decided by this Court. *See Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 386 (1960).

C. The District Court Properly Applied The *Hicks* Doctrine.

The district court in the case at bar made precisely the analysis required by *Mandel, Fusari, Usery* and *Hicks.* The court concluded (J. S. App. at 36a):

> "The court has great respect for the principle of *stare decisis* but is not bound by previous cases where different facts are alleged and where new and persuasive arguments are raised."

The district court properly held that this case was factually and legally distinguishable from *Jackson* and that this Court's summary affirmance in *Jackson* therefore did not dispose of the equal protection claim presented in this case.

The State Board does not contend that the three-judge court in *Jackson* decided the equal protection question presented in this case. The State Board contends, however, that the issue was raised in one brief filed in the district court in *Jackson* and that therefore *Jackson* is dispositive. (Appellant's Brief, at 15.) The State Board's reference is to the following passage in the brief filed by one of several defendants[22] in *Jackson*:

> "It must also be remembered that it is even more difficult for an independent candidate to obtain signatures. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for State offices, (section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago."

The State Board's contention is that, because of this one passage in the entire *Jackson* file, the district court in

[22] In *Jackson*, the defendants included members of the Chicago Board of Election Commissioners and members of the State Electoral Board, a predecessor of the State Board of Elections. The brief filed by the State Electoral Board in *Jackson* is submitted herewith as Appendix D.

the case at bar was precluded from reaching the merits of Rose's equal protection claim. This argument should be rejected for two reasons.

First, the equal protection question in this case is not the same as the contention raised in the defendants' brief in *Jackson.* The assertion in *Jackson* was that Section 10-3 was unconstitutional because it imposed more rigorous signature requirements on independent candidates than new political parties were forced to meet under Section 10-2.[23] That is not the claim made by the plaintiffs in this case.

More importantly, the State Board's contention overlooks this Court's ruling that a summary disposition is decisive only as to the "precise issues presented and necessarily decided" by this Court's action. *Mandel, supra* at 176. Even assuming *arguendo* that the equal protection question at issue here was presented to the district court in *Jackson,* it was not presented to or decided by this Court in that case.[24] Because the equal protection question now before this Court was not presented to or decided by this Court in *Jackson,* the

[23] Review of Sections 10-2 and 10-3 demonstrates that independent candidates and new political parties are, in fact, treated identically by the statutes. Both are forced to gather more signatures to attain ballot access in Chicago and Cook County elections than they must gather for ballot access in elections for statewide offices. The classification at issue in this case was not even referred to by any of the parties in *Jackson.*

[24] While it is true that the brief filed by the State Electoral Board was referred to in the jurisdictional statement filed in *Jackson* (Appendix C, attached hereto, at 19a), it can hardly be said that this "properly presented" the equal protection question at issue in this case. *Hicks, supra,* at 354 n.14. *Cf., Quilloin v. Wolcott,* 434 U.S. 246, 253 n.13 (1978); *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 597 n.14 (1954); S.Ct. Rule 15(1)(c).

summary affirmance in *Jackson* was of no precedential weight in this case.[25] The district court properly considered the merits of plaintiffs' equal protection claim and properly ruled in plaintiffs' favor.

This Court should affirm.

III.

THE COURT OF APPEALS PROPERLY HELD THAT THE ISSUE OF THE PROPRIETY OF THE MARCH 17 ORDER WAS MOOT.

The order entered by the district court on March 17, 1977, lowering the signature requirement to 20,000 and extending the filing date two weeks beyond the statutory deadline, expressly provided that its effect would be "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977." (App. 74.) The Chicago Board agreed to the entry of this order, but the State Board objected to the order.

The State Board maintained in the court of appeals that the Chicago Board did not have the authority to enter into any agreement to settle this case without the State Board's approval. However, this issue was moot by the time it reached the court. The election had passed. Gerald Rose had obtained the 20,000 signatures required by the March 17 order and had secured a place on the ballot. Thus, the authority of the Chicago Board to agree to the March 17 order without the State Board's prior approval could no longer effectively be challenged and no relief was possible. The issue was clearly moot.

[25] Even assuming *arguendo* that the district court was somehow bound by this Court's summary affirmance in *Jackson*, this Court would still be free to, and should, re-evaluate the *Jackson* decision. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Fusari v. Steinberg*, 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Moreover, the district court's order did not present a factual situation similar to those presented in cases in which this Court has found an exception to the mootness doctrine because the issue presented, though otherwise moot, was "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

A. The "Capable Of Repetition Yet Evading Review" Doctrine Requires A Showing On The Record That The Issue Presented Is Likely To Be Repeated In The Future.

In *Southern Pacific Terminal, supra*, the Interstate Commerce Commission utilized a device by which its orders could effectively escape review by the federal courts. The ICC repeatedly issued short-term orders which would expire before judicial review was possible. This Court held that, although each order presented a moot issue, the validity of these orders could be collectively reviewed by the courts. *Id.* at 515-16. The justification was that the ICC was continuing to issue these orders and the orders were thus "capable of repetition yet evading review." *Id.* at 515.

In *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), this Court articulated the two factual prerequisites which appellants like the State Board must establish in order to satisfy the "capable of repetition yet evading review" exception to the mootness doctrine:

> "(1) the challenged action [must be] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [must be] a reasonable expectation that the same complaining party [will] be subjected to the same action again."

Appellees concede that the first prong of this test was satisfied in this case. With the filing deadline past and the Special Election only a few weeks away, it would

have been impossible to obtain full appellate review of the Chicago Board's authority to settle this case.

However, the State Board has not satisfied the second prong of the *Weinstein* test. The State Board has not demonstrated that the issue presented by the Chicago Board's settlement may reasonably be expected to recur in the future. Certainly, the "reasonable expectation" requirement set forth in *Weinstein* is not satisfied by an appellant's mere conclusory assertion that the issue is capable of repetition. This prong of the "capable of repetition yet evading review" test must be satisfied by a factual showing that there is a likelihood of repetition. Thus, this Court properly recognized in *Commercial Cable Co. v. Burleson*, 250 U.S. 360, 362 (1939) that mere "anticipations of possible [governmental action] afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason." Where, as here, appellant's fear of recurrence is "merely . . . speculative," *Street Employees Div. 1287 v. Missouri*, 374 U.S. 74, 78 (1963), the "capable of repetition yet evading review" doctrine should not be applied.

The extent to which parties must establish on the record that an otherwise moot issue is "capable of repetition yet evading review" was precisely the issue recently before this Court in *SEC v. Sloan*, ... U.S. ....., 98 S.Ct. 1702 (1978). There, the SEC urged that the record was insufficient to determine whether the issue raised—involving SEC trading suspension orders—was likely of repetition. The SEC sought remand for further hearings to establish whether repetition was likely. This Court thoroughly reviewed the record and found a factual basis for the proposition that the issue was likely to be raised in the future. 98 S.Ct. at 1707-08 n. 5. No such finding is possible from the record in this case. Yet such a factual finding necessarily underlies every case

in which the " capable of repetition yet evading review" doctrine has been applied to governmental action.[26]

These cases have rested upon evidence that, because of past, similar conduct and a policy of continuing that conduct, a "reasonable expectation" exists that the same governmental conduct will recur in the future. The record here does not reveal prior and repeated similar episodes which have evaded review. The State Board does not claim that the Chicago Board ever before attempted to settle litigation without the State Board's approval. Nor does the record reveal a likelihood of future unilateral settlements by the Chicago Board. The Chicago Board has no policy favoring settlements contrary to the State Board's wishes. The record clearly indicates, by the language of the order (App. 74), that the Chicago Board wishes to avoid any future precedential application of the March 17 order.

The State Board failed to establish to the satisfaction of the court of appeals that the Chicago Board's settlement conduct is likely to recur, and the court properly ruled that the matter was moot.

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[26] In *United States v. N. Y. Tel. Co.*, 434 U.S. 159, 165 n.6 (1977), for example, this Court had before it a record reflecting "the [telephone] Company's policy of refusing to render voluntary assistance in installing pen registers and the Government's *determination to continue* to utilize them . . . ." (Emphasis added.) In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974), "[p]etitioner employer was engaged in *cyclically recurring* bargaining with the union representing its employees, and respondent state official was *continuously following* a policy of paying unemployment compensation benefits to strikers." *Weinstein v. Bradford, supra*, 423 U.S. at 148. (Emphasis added.) The pattern established in *Super Tire* reflected a "fixed and definite" governmental policy likely to be effectuated in future strikes. 416 U.S. at 124.

B. The Fact That This Case Involves An Election Does Not, In And Of Itself, Justify The Use Of The "Capable Of Repetition Yet Evading Review" Doctrine.

The State Board suggests that even though the two-prong test of the "capable of repetition yet evading review" doctrine has not been satisfied here, this doctrine should nevertheless be applied in any election situation. In support of this theory, the State Board cites *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). (Appellant's Brief at 19.)

It is true that this Court has applied the "capable of repetition yet evading review" exception to the mootness doctrine in several election cases to enable it to review legal issues arising in the context of a specific election even when the election has passed.[27] However, in each of those cases, the issue presented was the constitutionality of a statute which would continue to control future elections. The issue here is whether the Chicago Board had statutory authority to settle this case. The basis for hearing the other election-related cases was the same as in the non-election cases—there was a clear, factual likelihood that the issue would recur in the future. No such likelihood has been established here.

Moreover, even if the issue were to recur, the State Board would be able to press its claim at that time. If the State Board is correct that the Chicago Board has no discretion to settle federal court litigation, the State Board could secure an original writ of mandamus in the

[27] *Moore v. Ogilvie, supra; First National Bank of Boston v. Bellotti, supra,* at 1414-15 (1978); *Storer v. Brown, supra,* at 737 n.8 (1974); *American Party of Texas v. White, supra,* at 770 n.1 (1974); *Brown v. Chote,* 411 U.S. 452, 457 n.4 (1973); *Rosario v. Rockefeller, supra,* at 756 n.5 (1973); *Dunn v. Blumstein, supra,* at 333 n.2 (1972).

Illinois Supreme Court[28] or in the Circuit Court of Cook County.[29]

Thus, this case presents a situation much like the one presented in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). There, this Court recognized that "just because this particular case did not reach the Court [before circumstances rendered it moot] it hardly follows that the issue [appellant] raises will in the future evade review." *Id.* at 319.

If, in the future, it ever becomes apparent that the Chicago Board intends to enter into settlement negotiations against the will of the State Board, then the State Board may object to that practice. However, on this record, the court of appeals properly recognized that the issue of the Chicago Board's authority to settle a single, unique, non-precedential matter arising in the context of a special election did not appear to be "capable of repetition yet evading review", but was, in fact, moot.

Any finding to the contrary would have resulted in a decision in excess of the jurisdiction of the court of appeals:

> "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy. As the Court noted in *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' Its judgments must resolve a real and substantial controversy admitting of specific relief, through a decree of a conclusive character, as distinguished from an opinion

[28] Ill. Rev. Stat., Ch. 37, § 13. *See Lewis v. Dunne,* 63 Ill.2d 48, 344 N.E.2d 443 (1976); *Touhy v. State Board of Elections,* 62 Ill.2d 303, 342 N.E.2d 364 (1976).

[29] Ill. Rev. Stat., Ch. 37, § 72.25. *See Reynolds v. Conti,* 132 Ill. App. 2d 505, 270 N.E.2d 505 (1971); *People ex rel. Stoffel v. Town of Cicero,* 404 Ill. 432, 89 N.E.2d 350 (1949).

advising what the law would be upon a hypothetical state of facts." (Citations omitted.)

Preiser v. Newkirk, 422 U.S. 395, 401 (1975).

For the court of appeals to have determined the relative authority of the Chicago Board and the State Board for future elections in which no dispute may exist, would have resulted in just such an advisory opinion.

C. Even If The Issue Of The Chicago Board's Authority To Settle Litigation Was Not Moot, This Court Should Not Decide The Merits Of The Issue.

Assuming *arguendo* that the issue of the authority of the Chicago Board to enter into the March 17 agreement was not moot but, in fact, retained some vitality before the court of appeals, the question of the Chicago Board's authority to settle litigation certainly should not be considered by this Court in the first instance.

The question of the relationship between the Chicago Board and the State Board is a question of first impression and was not briefed by the parties in the court of appeals. The Illinois state courts have not had an opportunity to resolve this issue, nor has any federal court considered it.

Any determination of the relationship between the Chicago Board and the State Board will ultimately involve construction of several Illinois constitutional and statutory provisions.[30]

[30] Ill. Const., Art. III, § 3 (1970) provides: "All elections shall be free and equal."

Ill. Const., Art. III, § 5 (1970) provides: "A State Board of Elections shall have general supervision over the administration of the registration and election laws throughout the State."

(Footnote continued on following page)

Construction of these provisions may also involve a review of the local government "Home Rule" provisions of the 1970 Illinois Constitution, Ill. Const., Art. VII (1970), the application of Illinois common law to the effect that governmental bodies have implied powers in aid of their jurisdiction and to effectuate their statutory purposes, *Owens v. Green*, 400 Ill. 380, 400, 81 N.E.2d 149, 160 (1948), and the rule that a governmental body has implied authority to settle litigation in the public interest. *People ex rel. Ammann v. Dipper*, 392 Ill. 38, 43-44, 63 N.E.2d 870, 873 (1945); *Agnew v. Brall*, 124 Ill. 312, 315, 16 N.E. 230, 231 (1888).

This Court is certainly not required to undertake in the first instance such a searching analysis of Illinois law. Rather, the parties should be permitted to fully brief and argue this issue below. As this Court stated in *Singleton v. Wulff*, 428 U.S. 106, 120 (1976):

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant

[30] *continued*

Ill. Rev. Stat., Ch. 46, § 1A-1 provides:

"A State Board of Elections is hereby established which shall have general supervision over the administration of the registration and election laws throughout the State, and shall perform only such duties as are or may hereafter be prescribed by law."

Ill. Rev. Stat., Ch. 46, § 6-26 provides:

". . . [Municipal boards of election commissioners] shall, except as otherwise provided in this Section, have charge of and make provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time, or in such village or incorporated town, as the case may be. . . ."

> to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute."

Cf. Pinkus v. United States, ... U.S. ....., 98 S.Ct. 1808, 1815 (1978).

In the event that this Court concludes that the court of appeals erred when it dismissed the State Board's appeal from the March 17 order as moot, this Court should remand this question for further determination of whether or not the Chicago Board had the requisite authority to negotiate and consent to the March 17 order.

Of course, the question of the respective authority of the State Board and the Chicago Board would be more properly heard in the state courts than in the district court. As Mr. Justice Douglas stated in his concurring comments to the denial of emergency relief in *Jackson v. Ogilvie*, 401 U.S. 904 (1971):

> "While these issues are by our federal standard 'justiciable,' federal courts are usually less able than state courts to work their way through a maze of state electoral laws."

This Court has recently observed that:

> "In a federal system, it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts."

Elkins v. Moreno, ... U.S. ....., 98 S.Ct. 1338, 1348 n.16 (1978). In *Elkins*, this Court availed itself of a statutory certification procedure to permit the Court of Appeals of Maryland to construe Maryland Law. Illinois does not have a certification procedure. However,

> "when state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law. . . ."

Lehman Brothers v. Schein, 416 U.S. 386, 390 (1974). In *American Trial Lawyers Ass'n., New Jersey Branch v. New Jersey Supreme Court*, 409 U.S. 467, 469 (1972), for example, this Court noted that the relationship between the parties was "extremely delicate." As a consequence, this Court remanded the case to the district court with instructions to stay its proceedings pending a determination of the state law questions in the state court. *See also Reetz v. Bozanich*, 397 U.S. 82, 85-87 (1970).

Accordingly, if this Court deems it necessary to remand the question of the Chicago Board's authority to agree to the March 17 order, it should do so, following the logic in *American Trial Lawyers, supra*, with instructions that the district court retain jurisdiction but stay federal proceedings pending further litigation in the Illinois state courts.

CONCLUSION

For the reasons stated above, it is respectfully requested that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

Respectfully submitted,

JEFFREY D. COLMAN
JAYNE W. BARNARD
JENNER & BLOCK
One IBM Plaza - Suite 4300
Chicago, Illinois 60611
(312) 222-9350

WILLIAM H. LUKING
ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza - Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Counsel for Appellees,
Gerald Rose,
U.S. Labor Party, et al.

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APPENDIX

APPENDIX A

Ill. Rev. Stat., Ch. 46, § 10-2. "Political party" and "established party" defined—Formation of new party—Petition—Provisional organization—Committeemen

The term "political party", as hereinafter used in this Article 10, shall mean any "established political party" as hereinafter defined and shall also mean any political group which shall hereafter undertake to form an established political party in the manner provided for in this Article 10: Provided, that no political organization or group shall be qualified as a political party hereunder, or given a place on a ballot, which organization or group is associated, directly or indirectly, with Communist, Fascist, Nazi or other un-American principles and engages in activities or propaganda designed to teach subservience to the political principles and ideals of foreign nations or the overthrow by violence of the established constitutional form of government of the United States and the State of Illinois.

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or other political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area

of such district, political subdivision or municipality, is hereby declared to be an "established political party" within the meaning of this Article as to such district, political subdivision or municipality.

Any group of persons hereafter desiring to form a new political party throughout the State, or in any political subdivision greater than a county and less than the State, shall file with the State Board of Elections a petition, as hereinafter provided; and any such group of persons hereafter desiring to form a new political party, in any county shall file such petition with the county clerk; and any such group of persons hereafter desiring to form a new political party in any municipality or district less than a county shall file such petition with the clerk or Board of Election Commissioners of such municipality or district, as the case may be. Any such petition for the formation of a new political party throughout the State, or in any such district or political subdivision, as the case may be, shall declare as concisely as may be the intention of the signers thereof to form such new political party in the State, or in such district or political subdivision; shall state in not more than 5 words the name of such new political party; shall at the time of filing contain a complete list of candidates of such party for all offices to be filled in the State, or such district or political subdivision as the case may be, at the next ensuing election then to be held; and, if such new political party shall be formed for the entire State, shall be signed by not less than 25,000 qualified voters: Provided, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area.

The filing of such petition shall constitute the political group a new political party, for the purpose only of placing upon the ballot at such next ensuing election such list or an adjusted list in accordance with Section 10-11, of party candidates for offices to be voted for throughout the State, or for offices to be voted for in such district or political subdivision less than the State, as the case may be, under the name of and as the candidates of such new political party.

If, at such ensuing election, the new political party's candidate for Governor shall receive more than 5% of the entire votes cast for Governor, then such new political party shall become an "established political party" as to the State and as to every district or political subdivision thereof. If, at such ensuing election, the other candidates of the new political party, or any other candidate or candidates of the new political party shall receive more than 5% of all the votes cast for the office or offices for which they were candidates at such election, in the State, or in any district or political subdivision of the State, as the case may be, then and in that event, such new political party shall become an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, in which such candidate or candidates received more than 5% of the votes cast for the office or offices for which they were candidates. It shall thereafter nominate its candidates for public offices to be filled in the State, or such district or political subdivision of the State, as the case may be, under the provisions of the laws regulating the nomination of candidates of established political parties at primary elections and political party conventions, as now or hereafter in force.

A political party which continues to receive for its candidate for Governor more than 5% of the entire vote cast for Governor, shall remain an "established political party" as to the State and as to every district or political subdivision thereof. But if the political party's candidate for Governor fails to receive more than 5% of the entire vote

cast for Governor, or if the political party does not nominate a candidate for Governor, the political party shall remain an "established political party" within the State or within such district or political subdivision less than the State, as the case may be, only so long as, and only in those districts or political subdivisions in which, the candidates of that political party, or any candidate or candidates of that political party, continue to receive more than 5% of all the votes cast for the office or offices for which they were candidates at succeeding general elections within the State or within any district or political subdivision of the State, as the case may be.

Any such petition shall be filed at the same time and shall be subject to the same requirements and to the same provisions in respect to objections thereto and to any hearing or hearings upon such objections that are hereinafter in this Article 10 contained in regard to the nomination of any other candidate or candidates by petition. If any such new political party shall become an "established political party" in the manner herein provided, the candidate or candidates of such new political party nominated by the petition hereinabove referred to for such initial election, shall have power to select any such party committeeman or committeemen as shall be necessary for the creation of a provisional party organization and provisional managing committee or committees for such party within the State, or in any district or political subdivision in which the new political party has become established; and the party committeeman or committeemen so elected shall constitute a provisional party organization for the new political party and shall have and exercise the powers conferred by law upon any party committeeman or committeemen to manage and control the affairs of such new political party until the next ensuing primary election at which the new political party shall be entitled to nominate and elect any party committeeman or committeemen in the State, or in such district or political subdivision under any parts of this Act relating to the organization of political parties.

APPENDIX B

Ill. Rev. Stat., Ch. 46, § 10-3. Independent candidates—Nomination papers

Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures. Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area. For the first election following a redistricting of congressional districts, nomination papers for an independent candidate for congressman shall be signed by at least 5,000 qualified voters of the congressional district. For the first election following a redistricting of legislative districts, nomination papers for an independent candidate for State Senator or Representative in the General Assembly shall be signed by at least 3,000 qualified voters of the legislative district. Each voter signing a nomination paper shall add to his signature his place of residence, and each voter may subscribe to one nomination for such office to be filled, and no more: Provided that the name of any candidate whose name may appear in any other place upon the ballot, shall not be so added by petition for the same office.

The person circulating the petition, or the candidate on whose behalf the petition is circulated, may strike any signature from the petition, provided that;

(1) the person striking the signature shall initial the petition at the place where the signature is struck; and

(2) the person striking the signature shall sign a certification listing the page number and line number of each signature struck from the petition. Such certification shall be filed as a part of the petition.

(3) the persons striking signatures from the petition shall each sign an additional certificate specifying the number of certification pages listing stricken signatures which are attached to the petition and the page numbers indicated on such certifications. The certificate shall be filed as a part of the petition, shall be numbered, and shall be attached immediately following the last page of voters' signatures and before the certifications of stricken signatures.

(4) all of the foregoing requirements shall be necessary to effect a valid striking of any signature. The provisions of this Section authorizing the striking of signatures shall not impose any criminal liability on any person so authorized for signatures which may be fraudulent.

In the case of the offices of Governor and Lieutenant Governor a joint petition including one candidate for each of those offices must be filed.

Every petition for nomination of an independent candidate for any office for which candidates of established political parties are nominated by primary shall be filed at the time designated in Section 7-12 of this Act in regard to the nomination by primary of any other candidate for such office.

APPENDIX C

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1341

JESSE L. JACKSON, SHARON P. WILKINSON and MELVIN M. MACLIN,

Appellants,

v.

RICHARD OGILVIE, Governor of the State of Illinois and Chairman of the State Electoral Board of the State of Illinois, et al.,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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JURISDICTIONAL STATEMENT

Robert L. Tucker
840 East 87th Street
Chicago, Illinois 60619
312 994-2600

Kermit B. Coleman
6 South Clark Street
Chicago, Illinois 60602
312 726-6180

Thomas N. Todd
357 East Chicago Avenue
Chicago, Illinois 60611
312 649-8431

Attorneys for Appellants

Oral Argument Requested

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1341

JESSE L. JACKSON, SHARON P. WILKINSON and MELVIN M. MACLIN,

Appellants,

v.

RICHARD OGILVIE, Governor of the State of Illinois and Chairman of the State Electoral Board of the State of Illinois; WILLIAM J. SCOTT, Attorney General of the State of Illinois; JOHN LEWIS, Secretary of State, State of Illinois; CHARLES W. WOODFORD, Treasurer of the State of Illinois; MICHAEL J. HOWLETT, Auditor of Public Accounts of the State of Illinois; JAMES RONAN, Chairman of the Democratic Party State Central Committee of the State of Illinois; and VICTOR L. SMITH, Chairman of the Republican Party State Central Committee of the State of Illinois; in their individual capacities and as members of the State Electoral Board of the State of Illinois; JOHN C. MARCIN, City Clerk, City of Chicago, Illinois; STANLEY T. KUSPER, JR., Chairman and MARIE H. SUTHERS and FRANCIS P. CANARY, members of the Board of Election Commissioners of the City of Chicago, Illinois,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellants, plaintiffs in the Court below, appeal from the Judgment and Memorandum of Decision of two of the members of a three judge court, one judge dissenting, in the United States District Court for the Northern District of Illinois, Eastern Division, entered on January 28, 1971; which Judgment and Memorandum of Decision denied to appellants herein, injunctive relief; upheld the constitutional validity of certain provisions of the Election Code of the State of Illinois, as amended, namely Ill. Rev. Stats., Chap. 46, Secs. 10-3; 10-4; 10-6 (1969), which statutes purport to set forth the percentage requirements for acquiring and filing signatures of qualified electors by an independent candidate (a candidate not a member of an established political party) who would have his name placed on the ballot for public office in the State of Illinois; the time requirement for the filing of such signatures on nominating papers; and defines those persons who are eligible to sign nominating papers; or petitions for independent candidates for public office in the State of Illinois. This appeal is prosecuted by Jesse L. Jackson, Sharon P. Wilkinson and Melvin M. Maclin, plaintiffs below and appellants herein, to review the said Judgment and Memorandum of Decision of the District Court majority, with one judge dissenting, which majority decision held the foregoing statutes to be constitutionally valid. These appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of two of the members of the three judge court of the Northern District of Illinois, Eastern Division, contained in a Memorandum of Decision of the majority of the Court, with dissent, copy of the Judgment Order, and appellants' Notice of Appeal are attached hereto as Appendix A. For the convenience of the Court, the Complaint, plaintiffs' Motion for Temporary

Restraining Order, Answers of certain Defendants to the Complaint filed by plaintiffs, Memorandum of Law filed by certain state officials, named as defendants, in support of the plaintiffs' request for injunctive and declaratory relief, and plaintiffs' Motion for Summary Judgment are attached hereto as Appendix B.

JURISDICTION

This suit was brought by these appellants, plaintiffs below, under Title 28, U.S.C., Secs. 1331, 1332, 1343(3) and (4), 2201, 2202, 2203, 2281, 2284; and the Constitution of the United States; and more particularly the First, Fourteenth and Fifteenth Amendments thereto. The suit was prosecuted to challenge the constitutional validity of certain sections of the Illinois Election Code of 1969 as amended, namely: Chap. 46, Secs. 10-3; 10-4; and 10-6, which provisions purport to set forth the requirements in terms of the number of signatures required on nominating papers for an independent candidate (not a candidate of any established political party), to get on the ballot for public office in the State of Illinois; set forth the time within which such independent candidate may so qualify by the filing of nominating petitions or papers; and defines those persons eligible to sign nominating papers for an independent candidate for public office in the State of Illinois. The complaint also questions the constitutional validity of these statutes as they are being applied to the plaintiffs herein. The Memorandum of Decision and Judgment Order of the Court, with one judge dissenting was entered on January 28, 1971.

The judgment entered below and the Memorandum of Decision, upheld the constitutional validity of the foregoing statutes; denied these appellants injunctive relief and dismissed the cause of action brought by these appellants. On February 1, 1971, appellants herein, plaintiffs below, filed their Notice of Appeal, seeking to

review the aforesaid Judgment of the United States District Court. The jurisdiction of the Supreme Court of the United States to review the decision by direct appeal is conferred by Title 28, U.S.C., Sec. 1253 and 2281. The following decisions of the Court also sustain jurisdiction to review the judgment on direct appeal in this case:

Moore v. Ogilvie, 394 U.S. 814 (1969).
Williams v. Rhodes, 393 U.S. 23 (1968).
Wesberry v. Sanders, 376 U.S. 1 (1963).
Baker v. Carr, 369 U.S. 186 (1962).
Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935).
Matthews v. Little, 399 U.S. 1223 (1969).

QUESTION PRESENTED

The question presented by this appeal is whether the majority on the three judge panel of the United States District Court for the Northern District of Illinois erred in denying to appellants herein, plaintiffs below, injunctive relief; upholding the constitutional validity of certain provisions of the Illinois Election Code challenged herein, namely; Ill. Rev. Stats., Chap. 46, Secs. 10-3; 10-4; 10-6, as amended (1969), and by ordering the dismissal of the cause of action filed by these appellants; and more particularly whether the provisions of the Illinois Election Code challenged herein, deny to these appellants, plaintiffs below, and qualified voters of the State of Illinois, the right to meaningfully participate in the total election process of the State of Illinois; deny to these plaintiffs the freedom of speech and of association as well as deny to them equal protection and due process of law, all being secured to appellants by the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Appellants herein, plaintiffs below, have caused the entire record in the trial court below to be docketed in this court. On December 10, 1970, appellants all being Black citizens of the United States, and of the State of Illinois, and further being qualified voters in the State of Illinois, filed their complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against the defendants, Richard Ogilvie, in both his capacity as Governor and Chief Executive of the State of Illinois and as Chairman of the State Electoral Board; William J. Scott, Attorney General of the State of Illinois, in both his capacity as Chief law enforcement officer of the State of Illinois and as a member of the State Electoral Board; the remaining members of the State Electoral Board; City officials Stanley T. Kusper, Jr., Chairman and Marie H. Suthers and Francis P. Canary, members of the Board of Election Commissioners of the City of Chicago, Illinois, and John C. Marcin, City Clerk of the City of Chicago, Illinois.

Appellant, Jesse L. Jackson, seeks to qualify to have his name placed on the ballot as an independent candidate for the Office of Mayor of the City of Chicago, for election in the general election to be held on or about April 6, 1971. This appellant is not a member of any political party for the Office of Mayor of the City of Chicago, but as aforesaid, seeks to qualify as an independent candidate for said office.

Appellants, Sharon P. Wilkinson and Melvin M. Maclin, being duly qualified voters, assert their right to effectively participate in the total election process of the State of Illinois, and the City of Chicago, more particularly in support of the candidacy of Jesse L. Jackson as an independent candidate for the Office of Mayor of the City of Chicago. These appellants also seek to associate with other persons who would or might support the candidacy of appellant, Jesse L. Jackson, and

appellants Wilkinson and Maclin seek further to exercise their own rights of freedom of speech, association, petition and the right to effectively participate as voters in the total election process; such rights being secured to appellants under the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States.

Specifically, appellants alleged in their complaint that the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3; 10-4 and 10-6; invidiously discriminate against them in the lawful exercise of their federally protected rights to freedom of speech, association and the right to meaningfully and lawfully participate in the total election process of the State of Illinois; that the provisions of the aforesaid statutes challenged herein, because of the burdensome restrictions imposed by the State of Illinois upon independent candidates who seek to be placed on the ballot for public office, give established political parties of the State of Illinois and candidates who are the nominees of said parties, a decided and unconstitutional advantage over independent parties, as well as appellant, Jesse L. Jackson, in his effort to qualify to get on the ballot as an independent candidate for the Office of Mayor of the City of Chicago.

It was established on the hearing for a Temporary Restraining Order in the trial court below, and is not now disputed by any of the parties hereto, that in order to qualify under the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3, to have his name placed upon the ballot for election to the Office of Mayor in the general election now scheduled to be held on April 6, 1971, an independent candidate, and appellant Jesse L. Jackson, in particular, would have to obtain on nomination petitions, valid signatures of not less than 58,000 and not more than 90,000 qualified voters in the City of Chicago; and said nominating petitions containing such required number of valid signatures of qualified voters would have to have been filed by the independent candidate on or before February 1, 1971.

It was also established in the trial court below, and not now disputed by any of the parties hereto, that the

candidates for the Office of Mayor of the established Democratic Party, in order to qualify to have his name placed on the ballot in the primary election, now scheduled for February 23, 1971, was required to obtain only 4,099 signatures of qualified primary electors of his party. The candidate for the same office put forth by the established Republican Party, in order to qualify to have his name placed on the ballot for the primary election of February 23, 1971, was required to obtain only 2,034 signatures of qualified electors of his party.

Defendants, Richard Ogilvie, in his capacity as Chief Executive of the State of Illinois; and William J. Scott, in his capacity as Attorney General and Chief law enforcement officer of the State of Illinois, filed their answers in the trial court below, admitting the material allegations of the complaint filed by the appellants. Specifically, these defendants, state officials, admit that the provisions of Ill. Rev. Stats., Chap. 46, Sec. 10-3, which set forth the higher signature requirement as to independent candidates, invidiously discriminate against appellant Jesse L. Jackson; and that the State of Illinois has no substantial or compelling interest which would justify the imposition of such burdensome and higher signature requirement upon an independent candidate for public office. These defendants, state officials, by their answer further admit that in this regard, Sec. 10-3 of the statutes challenged herein, deny to appellants Sharon P. Wilkinson and Melvin M. Maclin federally protected rights. Defendants Richard Ogilvie and William J. Scott, further filed in the trial court below their Memorandum of Law in support of plaintiffs' request for injunctive and declaratory relief, which Memorandum of Law has been designated as a part of the Record docketed in this Court for purposes of this appeal.

Defendant state officials who were named as members of the State Electoral Board of the State of Illinois, and each of them, filed their Motion to Dismiss as such members of the State Electoral Board on the ground that, *inter alia*, neither the State Electoral Board, nor its

members were proper or necessary parties to the lawsuit; and that no duty is imposed upon the State Electoral Board, or the members thereof, by any State Statute, relative to the primary or general election that is the subject of appellants' lawsuit.

Only the city officials, who are named as defendant, Stanley T. Kusper, Jr., Chairman and Marie H. Suthers and Francis P. Canary, members of the Board of Election Commissioners of the City of Chicago, filed answers to both the complaint and the appellants' Motion for Temporary Restraining Order, denying plaintiffs' allegations and further denying that plaintiffs were entitled to relief; and these defendants, city officials, subsequently filed their own Memorandum of Law in Opposition to Injunctive and Declaratory Relief.

On January 21, 1971, appellants herein, plaintiffs below, filed their Motion for Summary Judgment, which the trial court took under advisement, as the trial court had already set the entire matter for oral argument on Friday, January 22, 1971.

In the Memorandum of Decision filed in the court below on January 28, 1971, with one judge dissenting, all three members of the three judge District Court concurred in the findings that: appellants, plaintiffs below, had standing to sue; that the issues presented to the trial court were justiciable; that the matter was properly before the three judge District Court; and that the signature requirement for getting on the ballot for public office was higher in the State of Illinois than the percentage required in a majority of other states. However, the majority on the three judge District Court panel concluded that appellants' challenges to the provisions of the Illinois Election Code, Ill. Rev. Stats., Chap. 46, Secs. 10-3, 10-4, and 10-6, were without merit, denied appellants injunctive relief and ordered their cause dismissed (See majority and dissenting opinions—Appendix A). It is the judgment of the majority of the three judge court below from which this appeal has been respectfully taken.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The federal question presented by this appeal is indeed substantial. This court has had frequent and recent occasion to acknowledge and reaffirm the principals that, the right to vote for the candidate of one's choice; the right to have that vote count; the right of persons to associate for mutual political and social benefits; and the right to engage in speech and to petition the government, are well established fundamental elements of "LIBERTY", protected against state impairment by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. Indeed, this court has had most recent occasion to remind the State of Illinois that such fundamental rights may be limited only where there exists a compelling state interest in the regulation of a subject which is within the state's constitutional power to regulate. *Moore v. Ogilvie*, 394 U.S. 814 (1969); *Williams v. Rhodes*, 393 U.S. 23 (1968).

There is no dispute among the parties to this cause as to what the qualifying requirements are. With respect to the qualifying requirements of an independent candidate, defined by statute as one who is not a member of an established political party, Ill. Rev. Stats., Chap. 46, Sec. 10-3 provides, insofar as applicable as follows:

> ". . . Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district or political division, equaling not less than 5%, nor more than 8% of the number of persons, who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial

> area; provided, that the maximum number of voters signing such petition may be increased to 25 whenever such amount is greater than the 8% limit hereinabove specified . . ."

The record in the trial court below shows, and all parties to this cause of action agree, that in order for the appellant, Jesse L. Jackson, to have qualified as an independent candidate for the Office of Mayor of the City of Chicago in the general election now scheduled for April 6, 1971, this appellant would have been required to have obtained and filed with the Board of Election Commissioners of the City of Chicago, Illinois, on or before February 1, 1971, not less than 58,000 nor more than 90,000 valid signatures of qualified voters who reside in the City of Chicago, Illinois. The record in the trial court below shows that no such burden is imposed upon candidates for the Office of Mayor who are members of an established political party. On the contrary, for purposes of getting on the ballot in the mayoralty primary now scheduled for February 23, 1971, the candidate for the established Democratic Party need to acquire and file only 4,099 signatures of qualified primary electors of his party. The candidate for the Office of Mayor put forth by the established Republican Party needed to acquire and file only 2,034 signatures of qualified primary electors of his party.

Appellant, Jesse L. Jackson, for himself, along with appellants Sharon P. Wilkinson and Melvin M. Maclin who support him, alleged in their complaint that appellant, Jesse L. Jackson, is a Black American, born to poverty and is now a person of limited financial means. It is alleged that this appellant, is without sufficient funds with which to hire the services of a corps of canvassers or political workers, and therefore, the said appellant had no practical, effective or realistic opportunity to acquire the requisite number of qualified or valid signatories on nomination papers within the restrictive and burdensome time frame imposed by the laws of the State of Illinois.

The time within which nominating papers for appellant Jackson must have been filed, is established by the provisions of Ill. Rev. Stats., Sec. 10-6, which insofar as is applicable provides as follows:

> ". . . Certificates of nomination and nomination papers for the nomination of candidates for the offices in cities, villages and incorporated towns shall be filed with the clerks of the cities, villages and incorporated towns at least 64 days previous to the day of such election, except that, in cities, villages and incorporated towns under the jurisdiction of a board of election commissioners, the certificates of nomination and nomination papers for the nomination of candidates for the offices in such cities, villages and incorporated towns shall be filed in the office of the board of election commissioners at least 64 days previous to the day of such election. Certificates of nomination and nomination papers for the nomination of candidates for the offices in townships shall be filed in the office of the clerk of the township at least 64 days previous to the day of such election, except that if the township is entirely within the corporate limits of a city, village or incorporated town under the jurisdiction of a board of election commissioners such certificates of nomination and nomination papers shall be filed in the office of the board of election commissioners instead of the clerk of the township, and if the township is partly within and partly without the corporate limits of a city, village or incorporated town under the jurisdiction of a board of election commissioners such certificates or a photostatic copy thereof of nomination and nomination papers shall be filed both in the Office of the Clerk of the township and in the office of the board of election commissioners. No certificates of nomination and nomination papers for the nomination of candidates for any of the aforesaid offices shall be filed with any such officer more than 99 days prior to the day of election. (Amended by Act approved May 22, 1967)."

The circumstances provoke the following inquiry: What valid compelling interest does the State of Illinois have in the premises as would justify the imposition upon one who would seek to qualify as an independent candidate for public office, such higher and greater burden than is imposed upon other candidates, and more particularly the candidates for the same office who are identified with or are members of established political parties? Extending this inquiry further, what valid compelling interest does the State of Illinois have in the premises as would justify the imposition of a standard of requirements upon those who would seek public office than is required by a huge majority of the remaining states in the United States? For a most persuasive answer to the foregoing inquiry, it is respectfully suggested that this court might properly look to and reasonably rely upon the responsive pleadings and the Memorandum of Law in support of appellants' request for injunctive and declaratory relief that was filed in the trial court below by Richard Ogilvie, Governor of the State of Illinois and William J. Scott, Attorney General of the State of Illinois, both of whom are named as defendants in this proceeding, and both of whom urged the trial court to be advised that the State of Illinois has no valid compelling interest in the premises as would justify the imposition of such burdensome restrictions upon liberty, and more particularly, upon the federally protected rights of appellants herein to meaningfully participate in the total election process of the State of Illinois as is secured to them by the Fifteenth Amendment to the Constitution of the United States, and to further lawfully exercise their First Amendment rights of free speech and of association as secured to applicants pursuant to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.

It is, we believe, significant to note that only the city officials who are named as defendants in the trial court below urge the Constitutional validity of the provisions of the Illinois Election Code challenged herein. These

defendants, city officials, have advanced matters of cost as being the compelling interest that the State has in imposing the higher and most restrictive burden upon the person who would qualify for public office as an independent candidate. We, however, would join with the Honorable Wilbur N. Pell, one of the members of the District Court three judge panel who in his dissenting opinion filed in the trial court below observed that ". . . the cost of preventing dilution of fundamental liberties should be one rather willingly borne . . ." Judge Pell also properly pointed out that no evidentiary hearing had been held before the three judge panel in the matter of proof of a compelling state interest, though the majority on the District Court panel was willing to find that such an interest did exist on the basis of the record. It is to be noted, however, that neither the Governor, the Chief Executive of the State, nor the Attorney General, the Chief law enforcement officer of Illinois, could find nor urge the existence of any compelling State interest that would justify the imposition of the burdensome restrictions confronting an independent candidate for public office as are contained in the provisions of the Illinois Election Code challenged herein. As was further observed by Judge Pell in his dissenting opinion, ". . . We must indeed search diligently for any rational justification for the exclusionary policy directed toward the indeed candidate . . ." in Illinois. The Illinois procedures challenged herein cannot pass muster against the charge of invidious discrimination and unconstitutional abridgment of the right to vote. *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969). Thus, the substantial federal question. *Baker v. Carr*, 396 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Hadnott v. Amos*, 394 U.S. 358; *Reynolds v. Sims*, 377 U.S. 533; *McPherson v. Blacker*, 146 U.S. 1 (1892); *Weisberg v. Powell*, 417 F.2d 388 (7th Cir. 1969); and *Briscoe v. Kusper*, U.S.C.A. 7th Cir. No. 18390 (1970).

CONCLUSION

For the foregoing reasons, appellants respectfully submit that jurisdiction by this Honorable Court should be noted. Further, that judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which denied to appellants herein injunctive relief; upheld the constitutionality of the provisions of the Illinois Election Code challenged herein, and ordered the dismissal of the cause of action asserted by these appellants should be reversed.

Respectfully submitted,

Thomas N. Todd
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 649-8431

Robert L. Tucker
840 East 87th Street
Chicago, Illinois 60619
(312) 994-2600

Kermit E. Coleman
6 South Clark Street
Chicago, Illinois 60602
(312) 726-6180

Attorneys for Plaintiffs-Appellants.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

(Title Omitted)

MEMORANDUM OF LAW OF DEFENDANTS' RICHARD OGILVIE, GOVERNOR OF THE STATE OF ILLINOIS, WILLIAM J. SCOTT, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND VICTOR L. SMITH, CHAIRMAN OF THE REPUBLICAN STATE CENTRAL COMMITTEE OF THE STATE OF ILLINOIS, IN SUPPORT OF PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

1. The issues in this case, as framed by the pleadings of the parties, is whether the following statutory requirements, violate the provisions of the First, Fourteenth and Fifteenth Amendments of the United States Constitution. The three statutes, all part of the Illinois Election Code (Chapter 46, Illinois Revised Statutes, 1969) are:

(a) Section 10-3, which requires an independent candidate for Mayor of the City of Chicago to obtain not less than 5%, nor more than 8%, signatures on his nominating petition of the number of persons who voted at the last preceding election for this office, while the Democratic and Republican candidates are only required to have 1/2% of said number.

(b) Section 10-6, which requires an independent candidate for the coming mayoralty election in Chicago to file his nominating petition by February 1, 1971, and

(c) Section 10-4, which Plaintiffs contend requires that an independent candidate's petition cannot be signed by one who had voted at the previous primary for Mayor of the City of Chicago.

I

Section 10-3 of the Illinois Election Code is in violation of the First and Fourteenth Amendments of the United States Constitution

2. Section 10-3 discriminates against independent candidates in several ways. An independent candidate is required to file a nominating petition for Mayor of the City of Chicago signed by not less than 5% of the number of persons who voted at the last election for said office while Democratic or Republican nominees were only required to have petitions containing only one-half of one percent of the number voting at said election. Thus, a Republican candidate needs only 2034 signatures, a Democratic candidate needs only 4099 signatures, while an independent candidate needs at the very minimum 58084 signatures. See Chicago Board of Election Commissions 1971 Calendar Supplement attached as an exhibit hereto. There is no impelling State interest for this discrepancy and invidious discrimination. Forty-two States require third parties to obtain the signatures of only 1% or less. *Williams v. Rhodes*, 393 U.S. 23, ... footnote 9 (1968). What was said in *Williams v. Rhodes* (page 25) is equally applical here, namely, that ". . . these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties." It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state offices, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago.

3. Further, an independent candidate's petition for Mayor of Chicago cannot exceed 8% of the vote cast at the last election for this office, but no limitation is placed on the maximum number of signatures that a Republican or Democratic nominee may have. thus it was reported in the press that the Democratic nominee filed a petition containing approximately 750,000 signatures, but an independent candidate is limited to a maximum of 92,935 signatures. What is the impelling State interest in this?

Under the minimum number of signatures required by Section 10-3, namely 2034 signatures for a Republican, 4099 for a Democrat, and 58,084 for an independent, one Republican signature accomplishes what it takes 30 independent signatures to do. One Democratic signature has 15 times the value of an independent signature. A Democratic signature has only one-half the value of a Republican signature. Clearly this is a violation of the one man, one vote doctrine; is a debasement or dilution of a citizen's vote and is weighing votes differently, according to party, thus denying equal protection of the laws to independent candidates in violation of the Fourteenth Amendment, *Baker v. Carr*, 369 U.S. 186, *Reynolds v. Sims*, 377 U.S. 533 (1964). It is also a denial of due process, *Moore v. Ogilvie*, 394 U.S. 814. It also impairs and limits plaintiff's "liberty" without a compelling State interest, *Briscoe v. Kusper*, No. 18390, U.S.C.A., 7th Circuit, December 22, 1970. It's also a violation of the First Amendment, *Williams v. Rhodes*, 393 U.S. 23 (1968).

II.

Section 10-6 is Unduly Restrictive and has no Compelling State Interest

Section 10-6 requires mayoralty petitions of independent candidates to be filed by February 1, 1971. Yet the ballots for the election in question can not be printed until after the primary is held on February 23, 1971. Section 10-6, therefore, is unduly restrictive and has no compelling State interest, *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968), *People v. Telford*, 103 Ill. App. 2d 132, 137 (1968).

Respectfully submitted,

William J. Scott
Attorney General
State of Illinois

Bernard Genis
Chief, General Law Division, Of Counsel
Room 820, 160 North LaSalle Street
Chicago, Illinois 60601
793-2522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

FILED
NOV 1 1977
MICHAEL RODAK, JR., CLERK

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

v.

SOCIALIST WORKERS PARTY, MICHAEL TABER, and JOHN DOE,
Plaintiffs-Appellees.

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

v.

GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, UNITED STATES LABOR PARTY, JOHN BROWN and MITCHELL HIRSCH,
Plaintiffs-Appellees,

and

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR.,
Defendant-Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF APPELLANT THE ILLINOIS STATE BOARD OF ELECTIONS

MICHAEL L. LEVINSON,
100 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Appellant Illinois State Board of Elections.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

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SOCIALIST WORKERS PARTY, MICHAEL TABER, and JOHN DOE,
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and

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR.,
Defendant-Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF APPELLANT THE ILLINOIS STATE BOARD OF ELECTIONS

SUMMARY OF ARGUMENT

So long as the principle of *stare decisis* is to remain the means by which the judiciary fosters the maintenance of public confidence in impersonal and reasoned judgments, sound judicial considerations mandate that this Court reaffirm its decision in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N. D. Ill. 1971), *summarily aff'd,* 403 U.S. 925 (1971).

In appellees' brief, Gerald Rose, U.S. Labor Party, *et al.,* (All future references to "appellees" refer to said appellees, unless otherwise noted), it is urged that an equal protection challenge to Secs. 10-2, 10-3 of 46 Ill. Rev. Stats. (Election Code) was neither presented to nor decided by either the district court or this Court in *Jackson.* In response to this contention, appellant makes three arguments: (1) that the 5% minimum signature requirement for nominating petitions for independent candidates to achieve access to the general election ballot withstood constitutional attack in *Jackson;* thus, this Court's summary affirmance was binding precedent on the courts below; (2) that the equal protection question at issue in this case, namely, dissimilar treatment afforded independent candidates and new political parties seeking office in the City of Chicago as compared to treatment afforded independent and new political party candidates seeking statewide office (25,000 minimum signature requirement) was presented to and decided by this Court in *Jackson;* (3) that even absent the *Jackson* decision, Secs. 10-2, 10-3 of Chap. 46 Ill. Rev. Stats. do not violate the Equal Protection Clause of the United States Constitution.

REPLY

I.

THE COURT'S SUMMARY AFFIRMANCE IN *JACKSON* v. *OGILVIE,* WAS BINDING PRECEDENT ON THE COURTS BELOW.

In *Jackson* v. *Ogilvie,* this Honorable Court ruled that the statutory provisions at issue were not discriminatory in light of an equal protection challenge identical to the equal protection challenge herein raised and argued unsuccessfully by the *Jackson* plaintiffs. The Illinois 5% signature requirement for nomination papers was specifically upheld as applied to independent candidates for Mayor of the City of Chicago — the same signature requirement for the same office sought by appellees in this action. Still, appellees argue that no "compelling state interest" has been proven in this action to justify the Illinois law governing ballot access; yet, the "compelling state interest" has been previously examined and settled by *Jackson.*

In attempting to avoid *Jackson,* appellees assert that this Court should acquiesce in the principle that this Court's previous holdings are susceptible to contrary holdings by the lower federal courts and cite *Hicks* v. *Miranda,* 422 U.S. 332, 95 S. Ct. 2281 (1975), in support thereof. Appellees further suggest that *Mandel* v. *Bradley,* 432 U.S. 173, 97 S. Ct. 2238 (1977), supports their restrictive and foundationless interpretation of the juristic principle of "summary affirmance." However, *Mandel* is in accord with *Hicks,* that courts are bound to follow the law as established by summary affirmances:

> As of January 31, 1978, only five reported cases had cited *Mandel* v. *Bradley: Morial* v. *Judiciary Comm'n,*

565 F. 2d (5th Cir. 1977); *In re Letourneau,* 559 F. 2d 892 (2d Cir. 1977); *Halderman* v. *Pennhurst State School & Hospital,* No. 74-1345 (E.D. Pa. Dec. 23, 1977); *Drumright* v. *Padzieski,* 436 F. Supp. 310 (E.D. Mich., 1977); *Moritt* v. *Governor of New York,* 42 N.Y. 2d 347, 366 N.E. 2d 1285, 397 N.Y.S. 2d 929 (1977). None of these cases indicates that lowers courts regard *Mandel* as an abandonment of *Hicks.* (Virginia Law Review, Vol. 64, p. 119, 1978).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After *Salera,* for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions should not be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved. *Mandel* v. *Bradley,* 97 S. Ct. at 2240.

Contrary to appellees' assertion, the *Hicks* case indeed supports appellant's argument, when as in this case, this Court is presented with an identical challenge against the same statute. In *Jackson,* as well as the case at bar, the equal protection argument relied upon by appellees was in fact raised in the *Jackson* Jurisdictional Statement. Accordingly, the summary affirmance in *Jackson* must be considered for its precedential value not only because the same statute is involved, (and in fact the same argument), but the facts are not even notably distinguishable.

In fact, appellees have inexcusably misstated the argument of appellant. On page 28 of the appellees' brief, they claim "The State Board does not contend that the three-

judge court in *Jackson* decided the equal protection question presented in this case." Nothing could be further from the truth. (See appellants' brief at p. 15.)

Appellees also claim, on pages 20-21 of their brief, that the equal protection argument was never raised in *Jackson;* yet, attached to their own brief is the Jurisdictional Statement filed in *Jackson* which reads at page 14A:

> These defendants, state officials, by their answer further admit that in this regard, Sec. 10-3 of the statutes challenged herein, deny to appellants Sharon P. Wilkinson and Melvin M. Maclin federally protected rights. Defendants Richard Ogilvie and William J. Scott further filed in the trial court below their Memorandum of Law in support of plaintiff's request for injunctive and declaratory relief, which *Memorandum of Law* has been designated as a part of the Record docketed in this Court for purposes of this appeal. (Emphasis supplied)

This *Memorandum of Law* referred to in this quotation and as contained in appellees' Appendix D, at page 23a states in pertinent part as follows:

> 2. Section 10-3 discriminates against independent candidates in several ways. . . . It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state offices, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago.

Hicks and *Mandel* support appellant's argument that *Jackson* v. *Ogilvie* is not notably distinguishable from the case at bar in terms of facts, issues and legal arguments.

The approach suggested by appellees would throw the doctrines of *stare decisis* and *summary affirmance* in chaos; therefore, appellees' contentions should be summarily rejected.

II.

SECTIONS 10-2 AND 10-3 OF THE ILLINOIS ELECTION CODE DO NOT DEPRIVE THE APPELLEES OF THEIR EQUAL PROTECTION RIGHTS.

In Illinois, any independent candidate or a candidate of a new political party who is running for an office, less than statewide, must gather signatures equaling at least 5% of the number of voters who voted at the last general election. Parenthetically, it is significant to note that this signature requirement is based upon the number of voters who actually *voted* at the last election and not, as it is in many states, upon the higher figure of voters who are *registered*. This signature requirement, based upon number of voters, is necessary so that some preliminary showing of support in the community is demonstrated before the ballot access is allowed. The actual number is flexible and varies, depending upon the office and the political subdivision.

Appellees, however, have conveniently utilized another section of Illinois law that deals with the signature requirements for candidates of statewide offices and juxtapositioned it so as to try to create an unlawful classification. The two sections of the statute are not related to each other and a discussion of the signature requirements for statewide candidates is not constitutionally significant regarding the validity of the 5% requirement for independent or new political party mayoral candidates seeking less than statewide office.

Appellees strenuously argue that the challenged classification fails to satisfy the "compelling state interest" test, citing a number of decisions of this Court covering the full gamut of equal protection controversies. However, the "compelling state interest" doctrine does not automatically invalidate each and every classification in the law. *Storer* v. *Brown*, 415 U.S. 724; 94 S. Ct. 1274. As noted in *Storer*:

> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a matter of degree, Dunn v. Blumstein, *supra*, 405 U.S., at 348, 92 S. Ct., at 1006, very much a matter of consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. Williams v. Rhodes, *supra*, 393 U.S., at 30, 89 S. Ct., at 10; Dunn v. Blumstein, *supra*, 405 U.S., at 335, 92 S. Ct., at 999. What the result of this process will be in any specific case may be very difficult to predict with great assurance. 415 U.S. at 731, 94 S. Ct. at 1279.

Appellant submits that the distinction between less-than statewide candidates and statewide candidates is not tantamount to an equal protection violation; that the failure of the State to apply a 5% minimum signature requirement to statewide candidates does not deprive appellees of their constitutional rights.

III.

THE ISSUE AS TO THE AUTHORITY OF A LOCAL ELECTION AGENCY TO REDUCE THE SIGNATURE REQUIREMENTS IS NOT MOOT.

Appellees argue that the issue of the authority of the Appellee, Chicago Board, to lower the statutory signature requirements and to extend the statutory petition filing deadline is moot since the order reflected an agreement entered to apply solely to the June 7, 1977 special mayoral election in Chicago. Obviously, the crucial issue is whether the Chicago Board or any election authority, for that matter, may lower signature requirements and extend filing dates for *any* election given their statutory authority under the Election Code. See, Ill. Rev. Stat., Ch. 46, Sec. 6-21 *et seq.*

The failure of the lower courts to decide this issue will undoubtedly lead to repetition of such action in future cases by the Chicago Board as well as by other municipalities and counties receiving nominating petitions and conducting elections. See, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 19 U.S. 498 (1911); *Moore* v. *Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493 (1969). Certainly, this issue is "capable of repetition, yet evading review."

In support of their argument, appellees, the Chicago Board, erroneously state that the State Board "agreed to a lowering" of the signature requirement for independent candidates from 63,373 to 35,947. (Brief of Appellee—Chicago Board of Election Commissioners at page 9.) In fact, the original 63,373 signature figure was an incorrect calculation by the Chicago Board. The Appellant corrected that figure to 35,947, which reflected 5% of the

voters who voted at the last election. As such, 35,947 was the correct minimum signature *requirement* for new political parties and independent candidate nominating petitions for the office sought.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

MICHAEL L. LEVINSON,
100 North LaSalle Street,
Chicago, Illinois 60602,
Attorney for Appellant
Illinois State Board of Elections.